No. 88-78

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE DOE, by her Parent and Natural Guardian, JOHN DOE, *Petitioner,*

v.

THOMAS SOBOL, as Commissioner of the New York State Education Department, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioners parents unilaterally placed her in a special education program at a private residential school, which had been recommended by the local school district and which the District Court found to be the only available appropriate program for the petitioner. The State conceded that its pre-approved list contained no appropriate placement for the petitioner. Nonetheless, the Court of Appeals held that the District Court lacked the jurisdiction, under the Education of the Handicapped Act, to award tuition reimbursement and a prospective injunction to petitioner's parents, for the sole reason that the private school was not on the State's pre-approved list and the State had, therefore, refused to contract with the school.

1. Under the Education of the Handicapped Act, does a Federal District Court lack the authority to direct placement or award tuition reimbursement to the parents of a handicapped child who have unilaterally placed their child in the only available appropriate educational placement, solely because the State educational agency has refused to contract with the recommended placement?

2. Can a State educational agency refuse to implement a handicapped child's properly developed Individualized Education Program without affording the child's parents the procedural and due process protections of the Education of the Handicapped Act?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding.

Jane Doe and John Doe are substituted, respectively, for the real parties, Lara Antkowiak and John Antkowiak. The petitioner wishes to proceed anonymously to preserve the privacy of Lara who has now returned to a regular high school after two years at a residential educational program.

When this action was commenced the New York State Education Department was headed by Commissioner Gordon M. Ambach, who was named as defendant in that capacity. He has since been succeeded in office by respondent Thomas Sobol, who has been substituted therefore in the caption. Sup. Ct. Rule 40.3.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on January 27, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a)[1] is reported at 838 F.2d 635 (2d Cir. 1988).

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[1] References to "App." are to the Appendix to this Petition

The opinion of the United States District Court for the Western District of New York (App. 16a) is reported at 653 F.Supp. 1405 (W.D.N.Y. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1988. App. 14a. On March 21, 1988, the court of Appeals entered an order denying the request for rehearing of the plaintiff-petitioner. App. 15a. On June 2, 1988, Justice Marshall ordered that the time for filing this petition for writ of certiorari be extended to and including July 19, 1988. App. 46a.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are: The Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R Part 300; and the New York Education Law §§ 4401.2 and 4402.2.b(2).

STATEMENT OF THE CASE

This case involves the Education of the Handicapped Act ("EHA" or the "Act") and the attempt of parents to secure an appropriate special education placement for their severely emotionally disturbed, adolescent daughter. What is now before the Court on the petition, is a Court of Appeals decision which limits the jurisdiction of a District Court to grant tuition reimbursement when a parent's unilateral placement of his handicapped child, in a private school, is later determined by the District Court to be appropriate under the EHA. The Second Circuit's decision also limits a District Court's jurisdiction to prospectively direct a placement, even when this results in

exclusion of a handicapped child from any educational services. The decision below sanctions a policy and practice of the New York State Education Department ("SED" or the "State") which will operate to exclude many of the most severely handicapped children from any educational services, without affording parents their procedural rights, including the right to notice and a due process hearing, pursuant to the Act.

A. History Of Lara's Emotional Problems: Early Attempts At Locating A Special Education Placement.

Lara Antkowiak is now a 15 year old girl with a long history of severe emotional problems, characterized by withdrawal from educational and other activities and by an eating disorder known as anorexia nervosa. 838 F.2d 636, App. 2a, 3a. In early 1985, following a history of psychiatric hospitalizations, at the suggestion of the hospital, Lara's father referred her to the Buffalo School District's Committee on the Handicapped ("COH"), requesting that they consider a residential educational placement. *Id.* at 637, App. 3a. At this time, Lara was still in a hospital setting and was unable to function educationally even with the one-to-one services of a special education teacher. *Id.* at 636, App. 3a.

On February 27, 1985, the COH classified Lara as educationally handicapped ("seriously emotionally disturbed") and prepared an Individualized Education Program ("IEP") to address Lara's needs. *Id.* at 637, App. 3a. The IEP identified Lara's need for a residential educational program (*id.*) where Lara's educational and emotional needs could be addressed in one setting. *See*, 653 F.Supp. 1407, 1408, App. 19a. It was established that this IEP was properly developed. Record at 547.

In accordance with SED policy, the COH, in March 1985, first attempted to locate an in-state school from SED's pre-approved list of private schools.[2] In all, nine different in-state schools rejected the application for placement. 838 F.2d 637, App. 3a. Attempts to place Lara at a State Office of Mental Health facility were also unsuccessful. 653 F.Supp. at 1409, 1410, App. 23a.

Having failed to locate an in-state school, the COH identified the Hedges Treatment Center of the Devereux Foundation in Devon, Pennsylvania ("Hedges") as a residential school that could meet Lara's needs. *Id.* at 1409, App. 21a. Since Hedges appeared on SED's current approved list, the COH simply forwarded the appropriate paperwork to SED, asking that SED approve the contract with Hedges. *Id.*, App. 21a, 22a.

Unknown to the COH, SED had placed a hold on new admissions to Hedges. *Id.* at 1414, 1415, App. 32a, 33a. Although SED allowed seven or eight New York students already at Hedges to remain, they would not approve new placements pending the resolution of several programatic concerns. *Id.* (SED agreed that none of the programatic concerns were applicable to Lara. *Id.* at 1415, App. 33a.) On this basis, SED refused to approve a contract for Lara's placement at Hedges. *Id.* at 1409, App. 22a. SED did not at this time identify, nor have they ever identified, an alternative educational placement that could appropri-

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[2] Under New York State procedures, the SED periodically publishes a list of private schools it has approved for special education placements. 653 F.Supp. 1413, 1414, App. 31a. Additionally, New York law requires SED approval of *each* school district application for a "special education" private school placement. N.Y. Educ. Law §§ 4401.2, 4402.2.b(2).

ately serve Lara's needs, despite repeated requests from the District Court that it do so. 838 F.2d 638, App. 6a.

At the time SED refused to approve Lara's placement at Hedges, it also suggested that based on its review of Lara's needs she was not properly identified as educationally handicapped (Record at 808), and was not in need of a residential educational placement. Record at 813. It is noteworthy, however, that when deciding whether to approve a private school placement, SED acknowledged that it acts without convening a COH or multidisciplinary team as defined in the EHA, without inviting the parent, and without providing the parent written notice of its decision or of the parent's right to request a due process hearing to challenge SED's actions. Record at 826, 827.

B. Early History Of This Lawsuit

Because the State had rejected the only school identified that could meet Lara's needs, petitioner commenced this action against SED on April 23, 1985, seeking an order directing SED to take action to ensure Lara a free appropriate public education under the EHA. 838 F.2d 637, App. 3a, 4a. Knowing that neither the COH nor SED had been able to locate an appropriate placement for Lara (other than Hedges) during the preceding two months, petitioner sought a preliminary injunction to mandate placement at Hedges pending a permanent placement elsewhere. *Id.*

On May 16, 1985, Lara's father obtained loans and unilaterally placed Lara at his own expense. *Id.*, App. 4a. Lara remained at Hedges, at her father's expense, for more than two years before she was released following the summer of 1987. *Id.* at 638, App. 6a. Lara's father incurred expenses of nearly $70,000.00 to maintain Lara's placement at Hedges. App. 45a.

Pursuant to an order of the District Court,[3] petitioner exhausted his administrative remedies and a due process hearing was held in early December 1985. 838 F.2d 637, App. 4a. Following the hearing, the impartial hearing officer determined that Lara was educationally handicapped and required a residential educational placement if she were to benefit from her education. *Id.* Having determined that no appropriate, alternative educational placements had been identified, the hearing officer ordered Lara's placement at Hedges. SED, however, refused to implement the hearing officer's decision. *Id.*[4]

In July of 1986, the District Court granted partial summary judgment for the plaintiff-petitioner.[5] The court held that the hearing officer's decision was final, insofar as it concurred with the COH determination that Lara was educationally handicapped and had needs as identified on her IEP. 653 F.Supp. 1411, App. 27a. The court ordered the case to trial on the merits, certifying several issues for trial, including the appropriateness of Hedges as a placement in light of its approval status. *Id.* at 1412, App. 28a. The District Court, in its July 1986 decision, specifically asked the parties to identify the availability of any alternative educational placements for Lara. *Id.*

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[3] *Antkowiak* v. *Ambach*, 621 F.Supp. 975 (W.D.N.Y. 1985)

[4] The Court of Appeals suggests that the parents resorted to litigation prematurely rather than cooperating with SED. 838 F.2d 642, App. 13a. This is a mischaracterization of the facts, as the parents specifically sought SED's assistance in securing a placement, even following up on SED's suggestions after the litigation was commenced. Litigation was commenced and a preliminary injunction sought because Lara was to be discharged from the hospital without a placement. *Id.* at 637, App. 3a, 4a.

[5] *Antkowiak* v. *Ambach*, 638 F.Supp. 1564 (W.D.N.Y. 1986)

C. The Trial And Post-Trial Decision

Following a non-jury trial, the District Court found that Lara was entitled to be placed at Hedges at SED's expense and ordered SED to effectuate her placement immediately. *Id.* at 1417, App. 38a.

In so ruling, the court relied upon a number of SED's statements: that Hedges is not claimed to be inappropriate (Record at 1001); that there is no other placement identified to which the court should direct placement (*id.* at 1015); that SED is not claiming the court cannot order payment for an unapproved program (*id.* at 1027); that SED is not making an issue concerning the quality of the program (*id.*); and that there were no other arguments which were put forth in response to Judge Curtin's request for all arguments (*id.* at 1000). Moreover, the court found that, at Hedges, "there was no indication that Lara was not receiving all the rights and benefits that she would receive at a New York State school [citing 20 U.S.C. § 1413(a)(4)(B)(ii)]." 653 F.Supp. 1415, App. 34a. Accordingly, the court held that the partial approval status of Hedges and lack of approval of the Devereux Day School did not preclude it from ordering Lara's placement there. *Id.*

The court also held that the services which Lara received at Hedges were educational and related services under the EHA and are necessary to enable her to derive any benefit from the special instruction she receives. *Id.* at 1416, App. 36a. The court also granted petitioner reimbursement for Lara's tuition from the date she was placed at Hedges to the date of the decision. *Id.* at 1419, App. 42a.

It should be noted that SED lifted its hold on new admissions and restored Hedges to full approval status,

effective January 1986, for children age 14 or older. Lara turned 14 on February 11, 1987, seven days before the post-trial decision. *Id.* at 1415, App. 34a.

D. The Second Circuit's Decision

The Court of Appeals reversed the District Court, finding that the court lacks jurisdiction to direct SED to place a handicapped child at an educational program or to award tuition reimbursement to the parents when the SED refuses to contract with that program. While the Court of Appeals noted the "unapproved" status of the particular program in question, its decision was not limited to cases where the program was not on the State's pre-approved list. Its decision applies to any SED refusal to approve a private school contract. 838 F.2d 640, 641, App. 11a; *see also*, footnote 2, *supra*.

In so ruling, the Court of Appeals relied on provisions of the EHA which require that private schools meet a State's educational standards, so that children placed in these schools have the same rights as children placed in facilities of the State. *See*, 20 U.S.C. § 1413(a)(B)(ii). The court reasoned that neither the Buffalo School District nor SED could place and fund Lara at Hedges without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet state educational standards. 838 F.2d at 640, App. 10a, 11a. Accordingly, the Court of Appeals held that "the district court could not order Lara's placement at Hedges without forcing SED to violate the EHA." *Id.*, App. 11a.

The Court of Appeals did not discuss petitioner's contention that SED was already violating the EHA by failing to comply with the Act's procedural requirements when it refuses to approve a contract with a private school. The court did not discuss petitioner's contention

that SED was also violating the EHA by failing to ensure that Lara received a free appropriate public education. Nor did the court comment on SED's concession that the funding to keep seven or eight New York State students at Hedges was lawful (Record 794, 795), and that the unapproved status was not itself a bar to payment for Lara. Record at 1001, 1027. Finally, in so ruling, the Court of Appeals did not address the District Court's finding that there was nothing in the record to indicate that Lara was not receiving all the rights and benefits she would receive at a New York State school. 653 F.Supp. 1415, App. 34a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH PREVIOUS HOLDINGS OF THIS COURT AND OF OTHER CIRCUITS, IN THAT IT UNDULY LIMITS THE JURISDICTION OF A DISTRICT COURT.

Under the EHA, a parent or guardian of a handicapped child is to be afforded an opportunity for a due process hearing and court review to allow him "to present complaints with respect to *any matter* relating to the . . . educational placement . . . or the provision of a free appropriate public education of such child." 20 U.S.C. § 1415(b)(1)(E) and (b)(2) (emphasis added).

When a court appeal is filed, the court is required to receive the record of the administrative proceedings and such other evidence as presented by the parties. Thereafter, the court is required to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

The decision of the Second Circuit conflicts with previous holdings of this Court and the other Circuits, in that it limits the jurisdiction of a District Court to review state

educational agency ("SEA") actions and to grant all appropriate relief.

A. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S HOLDING IN *BURLINGTON* AND THE HOLDINGS OF OTHER CIRCUITS, CONCERNING THE AUTHORITY OF A DISTRICT COURT TO GRANT TUITION REIMBURSEMENT AND OTHER INJUNCTIVE RELIEF TO PARENTS.

1. The Conflict with *Burlington*.

In *Burlington School Committee* v. *Dept. of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1985), this Court reasoned that, under the EHA, a District Court has the authority to award to parents retroactive reimbursement of tuition paid out for a private school placement, when the District Court determines that the private placement, rather than an alternative placement proposed by school officials, is the appropriate placement under the EHA.

> If [parents choose to assume the cost of a private school] . . . it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

471 U.S. at 370.

In petitioner's case, the District Court did determine that the private school at Hedges was appropriate and

that no other appropriate educational program had been identified which could meet Lara's needs. 653 F.Supp. at 1412, 1413, App. 28a-30a. Accordingly, the court awarded tuition reimbursement to the parents. *Id.* at 1419, App. 42a. By holding that the District Court did not have jurisdiction to grant this relief, the Second Circuit decision is squarely in conflict with *Burlington*.

The Second Circuit predicates its holding upon the fact that SED's actions were based upon its determination that Hedges did not meet the State's standards [20 U.S.C. § 1413(a)(4)(B)(ii)] and its authority, under State law, to contract or refuse to contract with a private school. *See*, N.Y. Educ. Law § 4402.2.b(2). The Second Circuit reasoned that the District Court had no jurisdiction to award tuition reimbursement, because doing so amounts to ordering SED to violate the EHA by placing a child at a private school that does not meet the State's educational standards. 838 F.2d 640, App. 10a. These factors, however, do not suffice to remove the conflict between this Court's holding in *Burlington* and the decision below.

A similar kind of argument was put forward by school officials in *Burlington*—namely, that the awarding of tuition reimbursement would amount to a violation of the EHA provision that requires a child to remain in his or her current placement during the pendency of any appeal. 471 U.S. at 371; *see*, 20 U.S.C. § 1415(e)(3). This argument was rejected by the Court, reasoning that parents who believe their children are improperly placed should not be forced to leave their child in an inappropriate placement or "to obtain the appropriate placement only by sacrificing any claim for reimbursement." 471 U.S. at 372.

The Court's analysis of the District Court's remedial powers is instructive in analyzing the authority of the court in the present case.

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act.

471 U.S. at 369.

As noted in Point IV, *infra*, the overriding purpose of the EHA is that all handicapped children are to be guaranteed a free appropriate public education ("FAPE"). *See*, 20 U.S.C. § 1400(c). Thus, under *Burlington*, courts should be afforded great discretion to grant appropriate relief, such as a prospective injunction or tuition reimbursement, when that relief is needed to ensure a FAPE. It was precisely that need to ensure Lara a FAPE that made the District Court's grant of tuition reimbursement and a prospective injunction appropriate under the circumstances. By holding that the court had no jurisdiction to do so, the Second Circuit puts itself squarely in conflict with *Burlington*.

In summary, the Second Circuit's holding, which unduly restricts the District Court's authority to grant appropriate relief in EHA cases, is in conflict with this Court's holding in *Burlington*.

2. Numerous Decisions Of Other Circuits Have Upheld The Broad Powers Of A District Court To Grant Tuition Reimbursement Or A Prospective Injunction Under The EHA.

The teachings of *Burlington* are that the District Court is afforded great latitude, under the EHA, to fashion remedies that will guarantee that handicapped children receive a free appropriate public education. 471 U.S. at 369. Accordingly, the various Circuit Courts have sanc-

tioned the power of the district courts to grant any relief necessary to meet the EHA's mandates. *See, e.g., Alamo Heights Indep. Sch. Dist.* v. *State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) (granting reimbursement for costs associated with placements in day care center and rehabilitation hospital); *Clevenger* v. *Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984) (reimbursement for cost of out-of-state residential school); *Abrahamson* v. *Hershman*, 701 F.2d 223 (1st Cir. 1983) (affirming lower court order requiring, alternatively, either placement in a residential school or placement in a day educational program combined with placement in a group home); *Vander Malle* v. *Ambach*, 673 F.2d 49 (2d Cir. 1982) (State Education Department ordered to continue child's placement at residential private school which had been taken off the State's approved list.)[6]

The First Circuit has explicitly rejected a narrow interpretation of a court's authority to grant appropriate relief.

> Section [1415](e)(2) not only creates a private right of action for aggrieved parties but also explicitly authorizes courts to "grant such relief as the court determines is appropriate." . . . Plainly this authorizes a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives. Moreover, because the Act is remedial in nature, we are charged with interpreting its provisions generously so as to effectuate the important goals Congress intended to achieve.

Doe v. *Brookline School Committee*, 722 F.2d 910, 919 (1st Cir. 1983). The Second Circuit's limitation of the federal Court's power to fashion appropriate relief is the antithesis of the "broad grant of equitable power" envi-

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[6] It is noteworthy that the holding of the Second Circuit in *Vander Malle* is in direct conflict with the holding of the court below.

sioned by the First Circuit. Contrary to the First Circuit's "maximum flexibility" approach, the decision below completely strips the Court of power to grant tuition reimbursement or injunctive relief when the State, at its total discretion, has decided not to contract for the school or services in question.

Unlike the Second Circuit, the Ninth Circuit has also recognized the EHA's broad grant of equitable power to the District Courts. It has held that a District Court may enjoin a state educational agency to provide services directly to a handicapped child whenever it determines that a local educational agency is unable or unwilling to serve the needs of the child. *Doe by Gonzales* v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), aff'd *sub nom Honig* v. *Doe*, ___ U.S. ___, 108 S.Ct. 592 (1988). Under the Ninth Circuit's holding, it only follows that an SEA which will not or cannot provide services directly can, in a proper case, be ordered by the court to fund these services at a private school.

B. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, CONCERNING THE EXTENT OF A DISTRICT COURT'S JURISDICTION TO REVIEW EDUCATIONAL AGENCY DECISIONS, WHEN THE EDUCATIONAL AGENCY HAS ACTED PURSUANT TO AUTHORITY IN STATE LAW OR STATE STANDARDS

As noted above, court review under the EHA includes the right to present complaints concerning "any matter" relating to a child's special education program. 20 U.S.C. § 1415 (b)(1)(E). The Second Circuit now holds that *a court is totally without jurisdiction* to review state educational agency ("SEA") decisionmaking, under the EHA, any time the SEA has denied educational services, acting

pursuant to its interpretation of State educational standards or pursuant to authority granted to the SEA by State law. Specifically, the decision below strips the District Court of jurisdiction any time the SEA refuses to implement an IEP because a private school is not on the SEA's pre-approved list, or any time the SEA refuses to contract with a private school. 838 F.2d 640, 641, App. 10a, 11a.[7] By so holding, the Second Circuit has placed itself in conflict with previous holdings of this Court and of several other Circuits.

1. The Conflict With This Court's Holdings In *Rowley* and *Tatro*

In *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), this Court rejected an argument that urged a very limited role for the District Court in EHA cases.

> The parties disagree sharply over the meaning of these provisions, [20 U.S.C. §§ 1415(b)(1)(E) and (e)(2)], petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program . . . . We find petitioner's contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts.

Id. at 205. *Rowley* specifically held that a court must review to "determine whether the state has created an [IEP] which conforms with the requirements of §

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[7] New York has erected a system whereby only the Commissioner of Education can approve a private school as a potential placement for handicapped children; a local school district is without authority to place a child at a private school unless the Commissioner approves the contract for placement. N.Y. Educ. Law §§ 4401.2 and 4402.2.b(2).

1401(19)" [*id.* at 206 n. 27] and to determine whether the IEP is reasonably calculated to ensure educational benefits to the child. *Id.* at 206 - 207.

In *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984), a limitation of the District Court's review authority in EHA cases, similar to that imposed by the Second Circuit's holding, was urged by the petitioner and rejected by this Court. The petitioner had argued that courts deciding EHA cases were limited to inquiring whether the educational agency had followed the State's educational standards as set forth in a state plan[8] and had followed the Act's procedural requirements. *Id.* at 890 n. 6. Reinforcing its holding in *Rowley*, the Court held that a District Court's review authority encompassed the review of a school's substantive obligation to provide specific "related services" to a handicapped child, under 20 U.S.C. § 1401(17), in order to ensure that she benefits from instruction. *Id.*

It is clear, then, that this Court has specifically rejected a reading of the EHA such as that of the decision below, which would limit a District Court's authority when an SEA alleges it has acted pursuant to State educational standards as set forth in a state law, state policy or a state plan. Under this Court's holding in *Rowley*, the reviewing court has both the authority and obligation to determine whether the child's IEP is reasonably calculated to ensure that she benefits from her education. The Second Circuit's holding directly conflicts with the holding of *Rowley*, in that a reviewing court confronted with an SEA which has refused to contract with a private school, is now without authority to review under the "educational benefit" stan-

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[8] See, 20 U.S.C. § 1413 regarding State plans.

dard to determine whether a handicapped child is receiving a FAPE.

2. The Decision Below Is In Conflict With Holdings Of The Third, Fifth, Seventh And Eleventh Circuits.

Three different Circuits have determined that state policies, which limited the special education school year to 180 days, were subject to review under the EHA upon a plaintiff's contention that the policy in question violated the right of handicapped children to a free appropriate public education. *See, Battle* v. *Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983); *Georgia ARC* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983).

In both *Battle* and *Georgia ARC*, the court was presented with the argument that the 180 day policy was not subject to judicial review, pursuant th the EHA, because the policy in question was part of the state's educational standards pursuant to 20 U.S.C. § 1401(18)(B) [*Battle*, 629 F.2d at 278], or part of a state plan pursuant to 20 U.S.C. § 1413 [*Georgia ARC*, 716 F.2d at 1573].

In *Battle*, the court went to great lengths to observe that educational policymaking is generally left to the states [629 F.2d at 278], but nonetheless held that a state's actions are subject to review under the EHA.

> Having concluded that the states are responsible in the first instance for setting reasonable educational objectives and reasonable means to achieve those objectives, it falls upon us to determine if the [EHA] restricts the states in these determinations. We believe that it does.

Id. at 279. Similarly, in *Georgia ARC* the fact that actions were taken pursuant to a state plan did not limit review by the court.

> There is nothing in 20 U.S.C. § 1415(e)(2) to suggest that the due process rights of a parent under the Act are to be curtailed merely because the challenge to the IEP happens to implicate a portion of a state's plan. We do not find that approval of Georgia's state plan by the Commissioner creates any presumption as to the legality of the 180 day policy found by the district court.

716 F.2d at 1573.

Along a similar vein, two different Seventh Circuit cases involved Illinois State law or policy that effectively precluded the educational agency from paying for a particular service. In *Parks* v. *Pavkovic*, 753 F.2d 1397 (7th Cir. 1985), the state law precluded payment of the first $100.00 of living expenses in residential educational facilities. In *Gary A.* v. *New Trier High Sch. Dist. #203*, 796 F.2d 940 (7th Cir. 1986), a state agency rule excluded counseling and therapeutic services from being considered special education services under the EHA. In both cases, plaintiffs sought review of educational agency decisions which relied on these "state standards" to deny payment for the services in question.

Despite the clarity of the law involved in *Parks* and the policy involved in *Gary A.*, the Seventh Circuit affirmed the holdings of the respective district courts which found the law and policy in question to be in conflict with the EHA's mandates.

In both *Parks* and *Gary A.*, the educational agency's reliance upon the relevant state standard was not permitted to limit the District Court's review authority under the EHA. Since in both cases the relevant educational standard served to force parents to pay for some of a handicapped child's special education services, the District Court had review authority pursuant to its mandate

to review complaints relating to the provision of a free appropriate public education. 20 U.S.C. § 1415(b)(1)(E) and (b)(2). By contrast, the Second Circuit has held that a District Court cannot review educational agency decisionmaking where the agency has acted pursuant to authority of state law, even where those actions affect the educational placement and serve to totally deny a free appropriate public education to a handicapped child.

The holdings of the Seventh Circuit, like those of the Third, Fifth and Eleventh Circuits, stand for the proposition that a District Court may review "complaints with respect to any matter" relating to the educational placement or provision of a free appropriate public education for a handicapped child [20 U.S.C. § 1415 (b)(1)(E)], even where an educational agency's actions were taken pursuant to a state's educational standards, as set forth in state law, state policy or a state plan. The Second Circuits' holding to the contrary is squarely in conflict with these other Circuits.[9]

II. THE SECOND CIRCUIT'S LIMIT ON THE DISTRICT COURT'S JURISDICTION, GOES SO FAR BEYOND THE ACCEPTED COURSE OF REVIEW UNDER THE EHA, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The decision below leaves a District Court without the authority to review SEA decisionmaking and grant

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[9] The Fourth Circuit in *Schimmel* v. *Spillane*, 819 F.2d 477 (4th Cir. 1987) has, like the Second Circuit, held that an educational agency cannot be required to place a child at a private school which the State educational agency ("SEA") has determined does not meet its standards. *Schimmel*, however, can be distinguished on its facts since an alternative appropriate placement had been identified which was preapproved by the SEA as meeting the State's educational standards. *Id.* at 484.

appropriate relief to complaining parents, in cases where the State had decided not to contract with a private school for specific services. By so ruling, the Second Circuit has eliminated the availability of a due process appeal and court review in an entire sub-group of special education cases—namely, in those cases where either the specific placement in question is a private school or the services in question are to be provided at a private school and the State has refused to contract for the placement or services.

No federal court has ever attempted to so drastically curtail the power of the District Courts in EHA cases. Indeed, this action is so extreme and unprecedented as to call for this Court's power of supervision.

III. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDING IN *ROWLEY*, IN THAT IT DENIES THE PARENT OF A HANDICAPPED CHILD THE RIGHT TO LITIGATE THE ALLEGED DENIAL OF DUE PROCESS AND PROCEDURAL RIGHTS UNDER THE EHA.

Under the Second Circuit's holding, the parent of a handicapped child has no right to litigate the alleged denial of due process and procedural rights under the EHA, if the alleged denial occurs within the context of a COH's attempt to place a child at a private school. The decision below allows a state educational agency ("SEA") to ignore the EHA's procedural mandates, with impunity, when the COH seeks to place a handicapped child at a private school. This is contrary to the Court's previous holding in *Rowley*.

In *Rowley*, the Court established the scope of a court's inquiry in actions brought under the EHA.

> First, has the *State* complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 206-207 (footnote omitted) (emphasis added). In establishing this two-pronged inquiry, the Court reasoned that compliance with the EHA's procedures would ensure, in most cases, "much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206; *see also, McKenzie* v. *Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, handicapped children will be afforded an appropriate education.").

In the case now before the Court, the Second Circuit failed to follow the standard of review established by *Rowley*, by making no attempt to determine whether there was State compliance with EHA procedural safeguards [*see*, 20 U.S.C. § 1415], despite petitioner's briefing of the issues below. The Court of Appeals did not even address the plaintiff's unrefuted contention that SED violated the parent's procedural rights by:

(1) failing to convene a group of individuals when deciding not to implement a child's IEP [*see*, 20 U.S.C. §§ 1401(18) and (19); 34 C.F.R. §§ 300.343 (a), and .533(a)(3)];

(2) failing to involve the parent in its decisionmaking process [*see*, *Burlington*, 471 U.S. at 368 ("the Act emphasizes the participation of parents in developing the child's educational program")(citing 20 U.S.C. §§ 1400(c), 1401(19), 1412(7), 1415(b)(1), 1415(b)(2); 34 C.F.R. § 300.345); *Rowley*, 458 U.S. at 182 n. 6];

(3) failing to provide notice to the parents of an adverse decision, or whenever the SEA refuses to initiate the educational placement [*see*, 20 U.S.C. §§ 1415(a) and (b)(1)(C)], and failing to inform the parents of all appeal procedures available under the EHA [20 U.S.C. § 1415(b)(1)(D)];

(4) failing to implement the IEP in a timely fashion [*see*, 34 C.F.R. § 300.342 (requiring implementation of the IEP as "soon as possible" following the COH meeting];[10]

(5) failing to afford to parents an impartial due process hearing to contest any action with which they disagree, including a hearing to contest actions of the SEA [*see*, 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.508].

Despite *Rowley's* clear mandate to the federal courts in EHA cases—i.e., to inquire whether "the State complied with the procedures in the Act" [458 U.S. at 206]—the Second Circuit simply chose to ignore and disregard the unrefuted contentions of the plaintiff-petitioner. By doing this, the Second Circuit has put itself in conflict with *Rowley* and has encouraged the SEA to disregard the EHA's procedural safeguards with impunity.

IV. THE DECISION BELOW RAISES IMPORTANT AND UNRESOLVED ISSUES, IN THAT IT ALLOWS THE STATE TO TOTALLY EXCLUDE HANDICAPPED CHILDREN FROM EDUCATIONAL SERVICES.

The Second Circuit's decision leaves Lara without any publicly-funded educational services. This is contrary to the EHA's clear mandate:

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[10] See, *Department of Education* v. *Carl D.*, 695 F.2d 1154, 1157 (9th Cir. 1983) (quoting the remarks of Senator Williams from 121 Cong. Rec. 37, 416 "I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development.").

> As a condition of federal financial assistance, the [EHA] requires States to ensure a "free appropriate public education" [FAPE] for all disabled children within their jurisdiction.

Honig v. *Doe*, *supra*, 108 S.Ct. at 596; *see*, 20 U.S.C. § 1412(1).

When enacting the EHA, Congress was concerned that a majority of handicapped children in the United States were totally excluded from schools. *Rowley*, *supra*, 458 U.S. at 179 (citing H.R. Rep. No. 94-332, p.2 (1975)). Congress specifically expressed these concerns in the statute, at 20 U.S.C. § 1400(b):

> **(b) Findings**
>
> The Congress finds that—
>
> * * * * *
>
> (4) one million of the handicapped children of the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
>
> * * * * *
>
> (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

In light of these findings, Congress made clear in § 1400(c) the unequivocal Federal policy to provide a FAPE to every handicapped child:

> **(c) Purpose**
>
> It is the purpose of this chapter to assure that *all* handicapped children have available to them, . . . a free appropriate public public education which

> emphasizes special education and related services designed to meet their unique needs.

20 U.S.C. § 1400(c)(emphasis added).

When one reviews the legislative history, it becomes clear that Congress was greatly concerned about the needs of emotionally disturbed children like Lara, statistics having revealed that the educational needs of 82 percent of all children with emotional disabilities went unmet. *Honig* v. *Doe*, *supra*, 108 S.Ct. at 596-597 (citing S. Rep. No. 94-168, p.8 (1975)). To address these concerns, Congress set priorities in the EHA, requiring States to serve first, handicapped children "who are not receiving an education" and serve second, handicapped children "with the most severe handicaps who are receiving an inadequate education." 20 U.S.C. § 1412(3); *see Rowley*, *supra*, 458 U.S. at 181.

Unfortunately, the Second Circuit's holding undermines the policies of Congress, as enunciated in the EHA, by permitting SED to deny a FAPE to a child who is educationally handicapped. The holding will affect any child for whom a private special education placement is sought, since the placement procedures (including the lack of compliance with EHA due process mandates, *see* Point III, *supra*), will be the same in every case. If the decision below is allowed to stand, and the issue of what happens to handicapped children without educational services remains unresolved, New York (and, any other states following New York's lead) is likely to return to the pre-EHA days when significant numbers of hard-to-place emotionally disturbed children were left without placements.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

DATED: Buffalo, New York
July 12, 1988

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APPENDIX

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APPENDIX

United States Court Of Appeals

FOR THE
SECOND CIRCUIT

Nos. 132, 222—August Term, 1987

(ARGUED SEPTEMBER 14, 1987 DECIDED JANUARY 27, 1988)

Docket Nos. 87-7300,-7344

LARA ANTOKOWIAK, by her Parent and Natural Guardian, John M. Antkowiak,
Plaintiff-Appellee, Cross-Appellant,

-against-

GORDON M. AMBACH, as Commissioner of the New York State Education Department,
Defendant-Appellant, Cross-Appellee.

BEFORE: CARDAMONE, WINTER and MINER,
Circuit Judges.

Appeal and cross-appeal from a final judgment and order entered against the state in an action brought in the United States District Court for the Western District of New York (Curtin, C.J.), granting plaintiff declaratory and injunctive relief under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* (1982), to effect her placement at an unapproved private school and require tuition reimbursement for her parents.

Reversed.

BRUCE A. GOLDSTEIN, Buffalo, N.Y. (Bouvier, O'Connor, Cegielski & Levine, James R. Sheldon, Jr., Neighborhood Legal Services, Inc., Ronald M. Hager, State University of N.Y. at Buffalo School of Law, Legal Assistance Program, Buffalo, N.Y., of counsel) *for Plaintiff-Appellee, Cross-Appellant.*

LESLIE NEUSTADT, Albany, N.Y. (Robert Abrams, Attorney General of the State of N.Y., Albany, N.Y., of counsel) *for Defendant-Appellant, Cross-Appellee.*

(Elizabeth L. Schneider, Monroe County Legal Assistance Corp., of counsel) *for Amicus Curiae Western New York Disability Law Coalition.*

MINER, *Circuit Judge:*

John M. Antkowiak commenced an action on behalf of his daughter, plaintiff-appellee Lara Antkowiak, in the United States District Court for the Western District of New York (Curtin, C.J.) against defendant-appellant Gordon M. Ambach, as Commissioner of the New York State Education Department ("SED"). The complaint asserted claims under the Education of the Handicapped Act ("EHA" or "the Act"), 20 U.S.C. § 1400 *et seq.* (1982); the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982); and 42 U.S.C. § 1983 (1982) for violation of plantiff's rights under the EHA and fourteenth amendment due process and equal protection clauses. Plaintiff sought declaratory and injunctive relief to effect a state placement of Lara at an unapproved out-of-state facility and reimbursement from the state for her private placement there.

After a bench trial, the district court granted judgment pursuant to the EHA in favor of plaintiff. Defendant appeals from this judgment. We reverse.

BACKGROUND

Since the age of ten Lara Antkowiak has suffered from emotional disturbances and anorexia nervosa. She became

anxious and upset about her schoolwork, although she was a bright child with an I.Q. of 143. Lara's schooling was disrupted by three lengthy stays at Strong Memorial Hospital ("Strong" or "the hospital") in Rochester between October 1983 and May 1985, necessitated by her condition. During this period, her ability to function educationally declined to the point that even efforts by the hospital's special education teacher to tutor her individually failed. Lara regularly refused to attend class. Even when she did, Lara stared out the window, was unresponsive, and occasionally become hostile.

In late 1984, Lara's parents, at the hospital staff's suggestion, applied to the Buffalo City School District Committee on the Handicapped ("COH") to arrange for an appropriate special education placement for Lara upon her discharge from Strong. After initially rejecting the application, the COH, upon further investigation, on February 27, 1985 found that Lara could not function in a regular classroom. Accordingly, the COH developed an individualized education plan ("IEP") for Lara and recommended placement for her at a residential educational facility. Rosalie Wiggle, coordinator of the COH, made six applications to in-state residential facilities, but each refused to accept Lara. The COH then applied to the Hedges Treatment Center ("Hedges") of the Devereux Foundation in Malvern, Pennsylvania, which accepted Lara. Therefore, on March 21, Ms. Wiggle applied to the SED for the Commissioner of Education's approval of a contract with Hedges.

Pursuant to an earlier telephone conversation, Edward McDonald, a regional associate of the SED in the Office for the Education of Children with Handicapping Conditions, notified Ms. Wiggle on April 17, 1985 that Lara's placement at Hedges would not be approved because the SED had imposed a moratorium on new admissions there. The regional associate recommended three approved in-state facilities, and Ms. Wiggle applied to them. Each declined to accept Lara.

While the COH was seeking a placement for Lara, Strong informed her parents that Lara no longer needed acute medical

treatment and would be discharged by April 24. In response, on April 23 Dr. Antkowiak brought an action on behalf of his daughter in the Western District of New York, in which he sought an order forcing the SED to place Lara at Hedges and interim injunctive relief preventing Strong from discharging Lara until an alternative placement was found. Thereafter, Dr. Antkowiak visited two residential treatment facilities at the SED's suggestion, but each of them determined that they could not meet Lara's needs. Ms. Wiggle did not seek further recommendations from the regional associate after both the COH and the Antkowiaks had looked into those facilities suggested by the SED, because Dr. Antkowiak placed Lara in Hedges at his own expense on May 15, 1985. Lara received academic instruction in the Devereux Day School at Hedges. After Lara's placement, the complaint was amended, and Strong was dismissed as a defendant in the suit.

Plaintiff moved for a preliminary injunction to require the SED to approve Lara's placement. On November 4, 1985, the district court denied this motion. 621 F. Supp. 975 (W.D.N.Y. 1985). Chief Judge Curtin found that Lara had not exhausted state administrative remedies first as the EHA requires, since the SED had made no formal adjudication of Lara's case in rejecting the COH's recommendation. *Id.* at 979. He ordered plaintiff to "immediately resume the[s]tate administrative process." *Id.* at 980.

The Antkowiaks thus sought a hearing through the board of education as required by law. *See* N.Y. Educ. Law § 4404(1) (McKinney 1981). The school district and Lara's parents stipulated that Lara was emotionally disturbed and needed placement at Hedges. The hearing officer found Lara in need of a residential placement, agreed with the COH's recommendation and, on December 26, 1985, ordered Lara's placement at Hedges. On January 24, 1986, the SED advised the school district that the placement could not be approved. Although Hedges was by then once again on the SED's approved list, it was approved only for children at least 14 years old, and Lara was only 12. Further, the Devereux Day School at Hedges had

never been approved by, or even sought approval from, the SED.

Plaintiff renewed the application for a preliminary injunction. The SED opposed the motion, contending that administrative remedies had not been exhausted through an appeal to the Commissioner. The district court found that neither the school board nor the Antkowiaks wanted to appeal the hearing officer's findings or decision, and thus neither was obligated to seek review by the Commissioner. *See* CIV-85-532C, slip op. at 4, 7 (W.D.N.Y. Feb. 3, 1986) (decision and order). Chief Judge Curtin found that the Antkowiaks had satisfied EHA exhausation requirements and ordered the Commissioner to show cause why the injunction should not issue. *Id.*

On February 11, 1986, the Commissioner issued an order to show cause why the hearing officer's decision should not be annulled. The district court deferred any further action pending the Commissioner's decision. CIV-85-532C, slip op. at 5 (W.D.N.Y. Feb. 27, 1987). On March 14, 1986, the Commissioner annulled the hearing officer's decision, finding that Lara had no "educationally handicapping condition" as defined in N.Y. Comp. Codes R. & Regs. tit. 8, § 200.1(cc)(2), 638 F.Supp. at 1583 (Appendix 2) (Commissioner's Decision of March 14, 1986), because her medical condition was "clearly distinguishable from her educational needs," *id.* at 1584.

Plaintiff moved for summary judgment in the district court, contending that the hearing officer's decision was final under the EHA. Chief Judge Curtin agreed, and on July 11, 1986, granted partial summary judgment as to the issues whether Lara was handicapped, whether she needed special education and related services, and whether her IEP appropriately recognized that need. 638 F. Supp. 1564, 1570-72 (W.D.N.Y. 1986). The court found that the Commissioner's annulment rested on improper grounds and thus did not consider his decision. *Id.* at 1570. Issues of the availability of alternative placements, and the nature, suitability and approval status of Hedges' services were set for trial. *Id.* at 1572.

Following a bench trial, Chief Judge Curtin found that no other placement was identified as appropriate for Lara despite the court's repeated requests for a recommendation from the SED. 653 F. Supp. 1405, 1412 (W.D.N.Y. 1987). The court also found that Hedges "is a suitable placement for Lara and meets most, if not all, of her needs." *Id.* at 1413. The court dismissed the importance of Hedges' unapproved status. Chief Judge Curtin noted that Lara, who had turned 14 one week before the decision, was now within the SED's approved age range for Hedges, and that there was "no indication that Lara is not receiving all the benefits and rights at Hedges that she would receive at" an in-state school. *Id.* at 1415. The related services that Hedges provided to Lara were found "necessary to enable her to derive any benefit from" the instruction she was receiving. *Id.* at 1416. The court therefore ordered the state to effect immediately the Hedges placement at state expense, *id.* at 1417, and, finding that Congress implicitly abrogated the states' eleventh amendment immunity in enacting the EHA, ordered the state to retroactively reimburse Lara's tuition at Hedges during the period of her private placement, *id.* at 1419.

Lara left Hedges in June 1987. Her parents enrolled her in a private school in Buffalo that was not a part of her original, and only, IEP from the COH.[1]

On appeal, the Commissioner contends that the district court exceeded its authority by ordering him to place Lara at Hedges, emphasizing the district court's refusal to recognize his determination of Lara's status and its holding that admin-

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[1] At oral argument of this appeal, the panel was informed of Lara's departure from Hedges. The panel therefore communicated with counsel by letter dated September 23, 1987, "to inquire whether counsel contends that any claims for injunctive or declaratory relief remain viable" in light of Lara's discharge. Plaintiff-appellee's counsel maintained that all the claims for declaratory and injunctive relief remain viable. Because of our disposition of the appeal, we do not address whether any relief sought by plaintiff-appellee has been mooted or remains a live controversy.

istrative remedies could be exhausted under the EHA without an appeal to the Commissioner. Further, the Commissioner contends that the eleventh amendment bars an award against the state for reimbursement of Lara's tuition at Hedges. Plaintiff cross-appeals from those orders of the district court requiring exhaustion of administrative remedies and deferring further proceedings until the Commissioner issued his decision.

Since the district court ordered relief pursuant to the EHA only, we review this case solely in regard to plaintiff's claims under that statute. Although we agree with the Commissioner that the district court exceeded its authority under the EHA, we do so for a substantially different reason. The issue here is not that the court failed to give "due weight" to state proceedings, *Hendrick Hudson Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 206 (1982), but that under the EHA, neither the hearing officer nor the district court could order Lara's placement in an unapproved school. Because of our resolution of this issue, we do not reach the eleventh amendment question.

DISCUSSION

The EHA "represents an ambitious federal effort to promote the education of handicapped children," *Hendrick Hudson Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982), through "federal funding to state and local school systems for the purpose of special education," *Dubois* v. *Connecticut State Bd. of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984). This funding is "conditione[d] . . . upon a [s]tate's compliance with extensive goals and procedures," *Rowley*, 458 U.S. at 179, according to federal standards, *Dubois*, 727 F.2d at 48.

For a state to qualify for funds under the EHA, that state must have adopted "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412(1) (1982), and developed a plan to effect that policy, *id.* § 1412(2). A state plan must meet the Act's requirement. *id.* § 1413(a). It must "assure that funds received by the

[s]tate . . . will be utilized . . . only in a manner consistent with the goal of providing a free *appropriate* public education for all handicapped children." *id.* § 1413(a)(2) (emphasis added). An appropriate public education consists of "special education and related services" that, *inter alia*, "*meet the standards of the [s]tate educational agency.*" *Id.* § 1401(18)(B) (emphasis added). Moreover, free public education may be provided in private schools and facilities, upon reference from state or local educational agencies, to carry out the EHA's requirements, *id.* § 1413(a)(4)(B)(i), and "in all such instances the [s]tate educational agency shall determine whether such schools and facilities meet standards that apply to [s]tate and local education agencies," *id.* § 1413(a)(4)(B)(ii).

Because "certain types of handicapping conditions . . . require very costly educational programs," New York has determined to support such special education and to offer relief for school districts "required to enter into contracts with private schools for the purpose of providing educational opportunity" to the handicapped. 1978 N.Y. Laws, ch. 786, § 1. New York has therefore adopted a plan to provide "a free appropriate public education for all handicapped children" as required by the EHA, *see* N.Y. Educ. Law §§ 4201-13, 4351-58, 4401-09 (McKinney 1981 & Supp. 1987); N.Y. Comp. Codes R. & Regs. tit. 8, §§ 200.1 *et. seq.* (1986), that "largely parallels the Act and federal regulations." *Rowley* v. *Hendrick Hudson Bd. of Educ.*, 632 F.2d 945, 949 (2d Cir. 1981) (Mansfield, J., dissenting), *rev'd*, 458 U.S. 176 (1982).

Under the plan, each school board must establish a Committee on the Handicapped ("COH") that recommends to it appropriate educational placements for handicapped children, N.Y. Educ. Law § 4402(1)(b), and develops an individualized education program ("IEP") for each handicapped child as section 1414(a)(5) of the EHA requires. *See id.* § 4402(1)(b)(3)(b). The school board acts on the COH's recommendations by "furnish[ing] suitable educational opportunities for handicapped children [through] one of the special services or programs listed in" section 4401(2). *Id.* § 4402(2)(a). This includes con-

tracts with private residential schools outside the state. *Id.* § 4401(2)(h). That option, however, is open only after the SED has determined that "there are no appropriate public or private facilities" in the state. *Id.* §§ 4402(2)(b)(3); 4407(1); *see Dubner* v. *Ambach*, 52 N.Y.2d 910, 911 n.*, 419 N.E.2d 337, 338 n.*, 437 N.Y.S.2d 659, 660 n.* (1981). Further, all contracts with private schools are subject to the Commissioner's approval. *Id.* § 4402(2)(b)(2); *Semel* v. *Ambach*, 118 A.D.2d 385, 387, 505 N.Y.S.2d 466, 467 (1986); *see Gregg B.* v. *Board of Educ.*, 535 F. Supp. 1333, 1336 (E.D.N.Y. 1982).

The district court found that the Commissioner "refused to provide Lara with the free, appropriate education to which she is entitled under the EHA" because the SED had declined to place Lara at Hedges, despite the determinations of the COH and the hearing officer, but had not come forward with an appropriate alternative placement. 653 F. Supp. at 1416. The court further found that Hedges was "a suitable placement for Lara and satisfies the requirements of her IEP," noting that the Commissioner did not dispute this. *Id.* Accordingly, Chief Judge Curtin ordered the Commissioner to effect Lara's placement. We conclude, however, that the district court had no authority to do so in this case.

The EHA requires that handicapped children in private placements have the same rights as those handicapped students placed in facilities of the state. *See* 20 U.S.C. § 1413(a)(4)(B)(ii). "In all such instances" where handicapped children are provided special education and related services at private facilities, the state determines whether the facility meets the same standards "that apply to [s]tate and local educational agencies." *Id.* Thus, the EHA "expressly incorporates [s]tate educational standards" and "the [s]tate has an obligation to insure that the school meets applicable [s]tate educational standards" when a private placement is made under the EHA. *Schimmel By Schimmel* v. *Spillane*, 819 F.2d 477, 484 (4th Cir. 1987). The requirement that the Commissioner approve all contracts between local school boards and private schools for the placement of handicapped children,

N.Y. Educ. Law § 4402(2)(b)(2), is such a standard. Neither a local school board nor the SED can approve a placement at a private school consistent with the EHA unless the Commissioner specifically approves of a facility prior to placement, in accordance with section 4402(2)(b)(2). *See Schimmel*, 819 F.2d at 484; *Smrcka by Smrcka* v. *Ambach*, 555 F. Supp. 1227, 1234 (E.D.N.Y. 1983).

The SED's office for the Education of Children with Handicapping Conditions, through the Division of Program Monitoring, maintains an "approved list" of private and out-of-state schools eligible to contract for the education of handicapped students from New York. *See* 653 F. Supp. at 1413-14. Out-of-state schools must seek approval by application to the SED, and the division monitors compliance by out-of-state schools with New York's standards and approves placements at such schools recommended at the local level. *Id.* at 1413

At trial, Hanna Flegenheimer, director of the Program Monitoring Division, testified that the SED closed new admissions to the Hedges in 1985 because (1) Hedges was not licensed in its home state as the SED required for approval, (2) "seclusion rooms" were purportedly used there, and (3) the SED was concerned about a school policy that would allow students at least 14 years old to sign themselves out of treatment. *Id.* at 1414. Hedges thus was not available as a placement when the SED refused to approve the Buffalo COH's contract with the facility. Nor was Hedges available when the hearing officer ordered Lara's placement there in December 1985.

Neither the SED nor the Buffalo School Board could place and fund Lara in an unapproved private school "without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards," *Schimmel*, 819 F.2d at 484. The hearing officer had no jurisdiction to compel either the school or the state to violate federal law, and thus her decision was void to the extent that it ordered Lara's placement at Hedges

without the Commissioner's approval. Likewise, the district court could not order Lara's placement at Hedges without forcing the SED to violate the EHA. Although the SED reopened Hedges for new admissions of students ages 14-21 in January 1986, Lara was then only 12. Even though Lara turned 14 a week before the court's final decision in the case, the court still could not properly order Lara's placement at Hedges without the Commissioner's approval of the contract. Moreover, the SED has never approved the Devereux Day School, which Lara attended for her academic program. In fact, Hedges' campus unit administrator testified at trial that the Day School had never sought SED approval "because it served primarily Pennsylvania day students and few out-of-state students." 653 F. Supp. at 1414. Thus, the district court exceeded its authority, under 20 U.S.C. § 1415(e)(2), to grant appropriate relief under the EHA. *See Schimmel*, 819 F.2d at 484.

We do not, however, base our decision on the district court's refusal to consider the Commissioner's decision. The Commissioner continues to press the contention that his decision is entitled to deference because "he is obligated to review a hearing officer's decision with which he disagrees," even if neither the parents nor the school board has appealed. 638 F. Supp. at 1582 (Appendix II) (Commissioner's Decision of March 14, 1986). He relies on N.Y. Educ. Law § 310, granting the Commissioner the authority to initiate administrative proceedings, and N.Y. Educ. Law § 4404(2), giving him the discretion to "review and modify" any school board determination concerning the nature of a handicap or the selection of a special education program. We have some doubt whether this review procedure is proper under the EHA.

The EHA provides that "any party aggrieved by the findings and decision rendered in . . . [a local] hearing may appeal to the [s]tate educational agency" for an impartial review. 20 U.S.C. § 1415(c). In this case the Antkowiaks received precisely the relief they sought from the hearing officer. Under the EHA, they "had neither the responsibility nor the right to appeal the favorable decision by the local hearing officer since they were

not aggrieved by [her] decision." *Robinson* v. *Pinderhughes*, 810 F.2d 1270, 1272 (4th Cir. 1987). Moreover, the school board chose not to appeal the hearing officer's decision. Thus, because that decision went unappealed, "it became the final administrative decision of the [s]tate" under section 1415(e)(1) of the EHA. *Robinson*, 810 F.2d at 1272.

Federal courts have authority under the EHA to enforce state procedure consistent with the federal scheme, but procedures "inconsistent with the federally-mandated procedures cannot, of course, be enforced by a federal court." *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 780 (1st Cir. 1984), *aff'd sub nom. Burlington School Comm.* v. *Massachusetts Dept. of Educ.*, 471 U.S. 359 (1985). While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the EHA and thus enforceable, *see id.*, those that merely add additional steps not contemplated in the scheme of the Act are not enforceable, *see Diamond* v. *McKenzie*, 602 F. Supp. 632 (D.D.C. 1985). The EHA considers final any unappealed decision of a hearing officer, *see* 20 U.S.C. § 1415(e)(1), and no further review appears to be contemplated under the Act. Thus, to the extent that the Commissioner's *sua sponte* review "would . . . subject children and their parents to an additional step not required by the EHA," 602 F. Supp. at 639, it would seem inconsistent with the finality provision of section 1415 and therefore without "official status or standing under the EHA," *id.* at 638.

We observe that this case has been complicated significantly by the unusual procedural posture in which it unfolded prior to appeal. The Antkowiaks' premature resort to the federal forum without exhausting their administrative remedies, the hearing officer's decision to order relief that was in part beyond her jurisdiction to afford, and the Commissioner's use of a compulsory review procedure where the hearing officer's decision had not been appealed by the parties, have contributed to the absence of a proper resolution of Lara's case. In enacting the EHA, Congress expressly sought to place on the parents and

the local educational agency "the primary responsibility for developing," through their cooperative efforts, "a plan to accommodate the needs of each individual handicapped child." *Smith* v. *Robinson*, 468 U.S. 992, 1011 (1984); *see Burlington*, 471 U.S. at 368; *Rowley*, 458 U.S. at 208-09; S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 27, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480, 1492 (stating that "*all* parties . . . will be involved throughout the process of establishment, review and revision of this program" (emphasis in original)). Accordingly, the Antkowiaks and the Buffalo City School District were obliged to continue seeking an appropriate placement for Lara in cooperation with the regional office of the SED. However, because the emphasis in this case has been upon litigation against the state, rather than upon the cooperation among the parents, school board and SED envisioned by the Act, Lara remained in an unapproved placement for which her parents cannot obtain the sanction of the EHA.

CONCLUSION

Because of our disposition of this appeal, we do not reach the other claims raised. In light of the foregoing, we reverse the judgment of the district court and remand for entry of judgment in favor of defendant.

United States Court of Appeals

FOR THE
SECOND CIRCUIT

Nos 87-7300, 7344

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of January one thousand nine hundred and eight-eight.

PRESENT: RICHARD J. CARDAMONE, RALPH K. WINTER, ROGER J. MINER, *Circuit Judges.*

LARA ANTOKOWIAK, by her Parent and Natural Guardian, John M. Antkowiak,
Plaintiff-Appellee, Cross-Appellant,

v.

GORDON M. AMBACH, as Commissioner of the New York State Education Department,
Defendant-Appellant, Cross-Appellee.

Filed: January 27, 1988

Appeal from the United District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it herreby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

/s/ Edward J. Guardaro
EDWARD J. GUARDARO, *Clerk*

United States Court of Appeals

FOR THE
SECOND CIRCUIT

Nos 87-7300, 7344

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of March one thousand nine hundred and eight-eight.

LARA ANTOKOWIAK, by her Parent and Natural Guardian, John M. Antkowiak,
Plaintiff-Appellee, Cross-Appellant,

v.

GORDON M. AMBACH, as Commissioner of the New York State Education Department,
Defendant-Appellant, Cross-Appellee.

Filed: March 21, 1988

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellee-Cross-Appellant, LARA ANTKOWIAK, by her Parent and Natural Guardian, JOHN M. ANTKOWIAK,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH, *Clerk*

UNITED STATES DISTRICT COURT
W.D. New York

No. CIV-85-532C

LARA ANTOKOWIAK, by her Parent and Natural Guardian, John M. Antkowiak,

Plaintiff,

v.

GORDON M. AMBACH, as Commissioner of the New York State Education Department,

Defendant.

Feb. 18, 1987.

Handicapped child and her father brought action against Commissioner of New York Education Department to require Department to pay for placement at private residential and educational facility in Pennsylvania. The District Court, Curtin, Chief Judge, held that: (1) Department's partial approval of residential treatment center facility in Pennsylvania did not preclude district court from ordering child's placement there pursuant to Education of the Handicapped Act; (2) Department was required to place child in Pennsylvania center as part of duty to provide free, appropriate education; and (3) Eleventh Amendment immunity was abrogated when Congress enacted Education of the Handicapped Act and, therefore, did not bar father of child from receiving reimbursement.

Judgment entered against Department.

Bouvier, O'Connor, Cegielski & Levine, Neighborhood Legal Services, State University of New York at Buffalo, Legal Assistance Program (Bruce A. Goldstein, James R. Sheldon, and Ronald M. Hager, of counsel), for plaintiff.

Robert Abrams, Atty. Gen. of the State of N.Y. (Peter B. Sullivan, Asst. New York State Atty. Gen., of counsel), Buffalo, N.Y., for defendant.

CURTIN, Chief Judge.

Plaintiff Lara Antkowiak is a 14-year-old girl with profound emotional disturbance and a severe eating disorder, anorexia nervosa. Lara's illness first surfaced when she was only ten yeas old, and since that time, she has been hospitalized on several occasions, once for nearly one year. The issue in this case is whether the New York State Education Department [SED] must pay for Lara's placement at a private residential and educational facility in Pennsylvania.

Plaintiff John Antkowiak, on behalf of his daughter, seeks relief under the Education for the Handicapped Act [EHA], 20 U.S.C. § 1401, *et seq.*; the Rehabilitation Act, 29 U.S.C. § 794; and the Fourteenth Amendment of the United States Constitution by way of 42 U.S.C. § 1983. A non-jury trial was held in October of 1986, and summations were heard on December 19, 1986. For the reasons below, I find that plaintiff is entitled, pursuant to the EHA, to have his daughter placed at the Hedges Treatment Center at defendant's expense.

Many of the matters discussed in this decision have been fully addressed in prior decisions. *See* Orders of November 5, 1985 (Item 31), 621 F.Supp. 975; February 3, 1986 (Item 45); February 27, 1986 (Item 52); and July 11, 1986 (Item 63), 638 F.Supp. 1564.

In May of 1976, when Lara was three years old, her mother, Kathleen, became seriously ill with a connective tissue disorder. She became increasingly disabled and was unable to care for Lara. Kathleen Antkowiak died in June of 1977. Lara's father, John Antkowiak, M.D., remarried in 1978. At trial, he testified that Lara's adjustment to her mother's death was apparently quite good. She did not show any indication of emotional difficulties, and was progressing very well, both

academically and socially. In fact, Lara has been described by teachers and psychologists as a very intelligent child, and has scored well on intelligence tests.

In the spring of 1983, however, when Lara was 10 years old, she became anxious and upset about her schoolwork. Dr. Antkowiak testified that at that time, Lara became increasingly withdrawn from her family and friends and began spending all her play time doing homework. He testified that Lara would review her assignments five or six times. In June of 1983, Lara's doctor noticed that she had not gained any weight since her last physical examination in the summer of 1982. Despite encouragement from her family, Lara would not eat and began to exercise compulsively. From October through December of 1983, Lara was hospitalized at Strong Memorial Hospital in Rochester, New York. During that time, the elementary school Lara attended sent packets of school work to the hospital; Lara completed only some of these.

Dr. Antkowiak testified that Lara returned to school for a short time in January of 1984, but went downhill and was readmitted to the hospital in February. She remained there until late March or early April. Her attention to her schoolwork declined during this second hospitalization.

In the early summer of 1984, Lara was hospitalized for a third time. She was admitted to the psychiatric unit at Strong Memorial. Throughout the fall of 1984, Lara derived no benefit from any educational program. According to Dr. Antkowiak, she deteriorated even further in the psychiatric unit and was transferred to a medical ward at Strong Memorial, where she remained until May 15, 1985.

From January through May of 1985, Lara was tutored by Ann Quivey, a special education teacher at Strong Memorial Hospital. Lara worked with Ms. Quivey on a one-to-one basis in a small classroom in the hospital. Ms. Quivey testified that Lara was initially cooperative and responsive to questions. They would usually meet for one hour each day. As time went by, however, Lara regressed. Ms. Quivey testified that as of

mid-April, Lara regularly refused to come to class. Ms. Quivey would find Lara curled into a fetal position in her bed with the lights out. When Ms. Quivey did manage to persuade Lara to come to class, she would stare out the window and not respond to questions, occasionally becoming hostile.

Frank Alabiso, a licensed psychologist who has worked with children and their families for 17 years, examined Lara at the Antkowiaks' request in April of 1985. He testified that Lara was emotionally guarded, socially withdrawn, and extremely obsessive:

> All in all, I found her to be one of the most disturbed children I had seen in my practice . . . . I thought she was completely incapacitated in terms of benefiting in any standard educational program. . . . She really needed an educational program in a residential milieu . . . . It needed to be a program that would incorporate both the child's educational needs and all the emotional, psychological, social and residential services in order to allow her to be able, or any child to be able, to function educationally.

Item 68, Vol. 2, pp. 8-9.

Dr. Antkowiak testified that throughout Lara's last hospitalization at Strong Memorial, he was advised to look for a program which could tend to Lara's emotional, educational, and social needs, in addition to her physical problems. He spoke with various facilities throughout the country during the late summer and fall of 1984; none would accept Lara. At that time, Dr. Antkowiak also contacted the Devereaux Foundation in Eastern Pennsylvania and sent the admissions officer information about Lara. In December of 1984, Dr. Antkowiak contacted the Buffalo School District at the suggestion of the staff at Strong Memorial.

Pursuant to the federal Education for the Handicapped Act [EHA], 20 U.S.C. § 1401, *et seq.*, a state, such as New York, which receives financial assistance from the federal government pursuant to the Act must comply with certain requirements. The state must develop a plan to ensure that all children in need of special education and related services are identified,

evaluated, and given a "free appropriate public education." To receive a "free appropriate public education," a handicapped child must have access to a program which is sufficient to confer some educational benefit to the child. *Hendrick Hudson Board of Education* v. *Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Under the EHA, it is the responsibility of the local educational agency to determine whether a child is handicapped and, if so, to develop a special program (Individualized Educational Program or IEP)[1] to meet that child's needs. 20 U.S.C. § 1401(a)(19), 1412(4), and 1414(a)(5). New York State has chosen to place the responsibility for determining whether a child is handicapped and designing an IEP with the Committee on the Handicapped [COH] of each local school district in the State. NY Educ. Law § 4402.1; *Riley* v. *Ambach*, 668 F.2d 635, 637 (2d Cir. 1981). (*See* Decision and Order of February 3, 1986 (Item 45).)

The Buffalo School District's Committee on the Handicapped met on January 16, 1985, and determined, based on the limited information before it, that Lara was not handicapped so as to

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[1] 20 U.S.C. § 1401(a)(19) provides:

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such service, and (E) appropriate procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

need special education. After the meeting in January, the COH obtained more information on Lara's condition.

Dr. Lew Conti, a school psychologist and member of the Buffalo COH, testified that he attended a meeting at Strong Memorial Hospital. After speaking with Ms. Quivey and others, Dr. Conti concluded that Lara's educational program was suffering immeasurably (Item 68, Vol. 1, p. 107). In light of the new information received, the COH met again on February 27, 1985. The COH concluded that Lara could not function in a regular classroom, and recommended that she be placed in an educational residential facility.

Following this recommendation, application was made to several residential educational programs in New York State. Rosalie Wiggle, coordinator of the Buffalo COH, testified that she called nine schools located within the State, and then sent applications to six of those schools which sounded as if they might be appropriate for Lara. All six rejected Lara's application.[2] At that point, Ms. Wiggle sent an application to the Devereaux Foundation, which provides, among other things, an educational residential placement for emotionally disturbed children. Lara was accepted (Item 68, Vol. 1, pp. 68-70).

Since the Devereaux Foundation is an out-of-state private school, the COH could not, under New York law, effectuate Lara's placement without the approval of the Commissioner of the New York State Education Department. NY Educ.Law § 4401(2) and 4402(2)(b)(2) and (3). (*See* Decision of February 27, 1986 (Item 52).) Ms. Wiggle testifeid that she sent the acceptance letter from Devereaux, along with six letters of rejection from New York State schools, to the State Education Department [SED], and requested that Devereaux be approved as a placement for Lara.

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[2] The six schools that initially rejected Lara were Randolph, Hillside, Gustavus Adolphus, Gateway Methodist Home, Wyndham Lawn, and Hopevale (Item 68, Vol. 1, p. 69).

According to Ms. Wiggle, in the ordinary course, the State Education Department returns a copy of the application and acceptance letter from a school with a stamp of approval from the State Educational Department's regional associate. She testified that in her experience, there had never been a rejection by the regional associate. Ms. Wiggle has been the coordinator for the Buffalo COH for seven years. In Lara's case, however, the regional associate called Ms. Wiggle on April 16, 1985, to advise her that Lara's placement at Hedges would not be approved. Three days later, Ms. Wiggle received a letter from the State Education Department, stating that the Hedges Treatment Center of the Devereaux Foundation, where Lara was to be placed, was closed to new admissions. The SED Regional Associate suggested that the Committee apply to three additional schools in New York State.

Ms. Wiggle testified that she applied to these schools as suggested, but all three rejected Lara's application.[3] Ms. Wiggle testified that she did not contact the regional associate again after receivng these three rejections, because the Antkowiaks privately placed Lara at Hedges in May of 1985 (Item 68, Vol. 1, p. 79).

While the COH was in the process of applying to private schools in New York State, Strong Memorial Hospital informed the Antkowiaks that Lara would have to be discharged. According to Dr. Antkowiak, the hospital had threatened to begin legal proceedings to have Lara placed in a foster home by the end of April. On April 23, 1985, plaintiff brought this action, seeking an order directing the New York State Education Department to place Lara at the Devereaux Foundation. Plaintiff also moved for interim injunctive relief ordering Strong Memorial Hospital, originally a co-defendant in this suit, to refrain from discharging Lara until an alternative

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[3] The three additional schools were the Convalescent Home for Children, the Anderson School, and the Rhinebeck County School (Item 68, Vol. 1 p. 7).

placement was found. After the lawsuit was filed, State officials advised Dr. Antkowiak to apply to two additional programs, both residential treatment facilities.

Residential treatment facilities are essentially mental health facilities which may have an educational component, according to Hannah Flegenheimer, Director of the Division of Program Monitoring with the SED's Office for the Education of Children with Handicapping Conditions, who testified for defendant.[4] Placement at residential treatment facilities may be funded jointly by the SED and the New York State Office of Mental Health; application for placement in such a facility is made to the Office of Mental Health (Item 68, Vol. 3, pp. 113-18). Residential Treatment Facilities differ from educational residential programs, which are designated as "schools" by the SED. Placement at an educational residential program is paid by the SED and governed by the terms of the IEP, designed by the local Committee on the Handicapped (Item 68, Vol. 3, pp. 143-44).

Although the Buffalo Committee on the Handicapped recommended an educational residential placement for Lara, Dr. Antkowiak submitted an application to the State Office of Mental Health and contacted the two residential treatment facilities recommended by state officials: the Hillside facility in Rochester, New York, and the Parsons Facility in Albany, New York (Item 68, Vol. 1, p. 26). Dr. Antkowiak and Dr. Alabiso visited both facilities. After meetings and discussions with administrators at each facility, they were told that the program could not meet Lara's needs—either physically, educationally, or emotionally (Item 68, Vol. 1, pp. 27-28). After receiving this information, Dr. Antkowiak withdrew his application with the Office of Mental Health (Item 68, Vol. 1, p. 40).

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[4] At trial, counsel for defendant stated that some children who are placed in residential treatment facilities receive their education outside the facility, occasionally at the local community school.

Faced with the threat that Lara would be discharged from the hospital and with no further suggested placements from representatives of the State, the Antkowiaks privately placed Lara at the Hedges Treatment Center of the Devereaux Foundation on May 15, 1985. During trial, counsel for defendant conceded that no educational residential facility in New York State was identified as appropriate for Lara, and that neither of the two residential treatment facilities in New York State recommended for Lara was appropriate (Item 68, Vol. 1, pp. 43-49).

After Lara was placed at the Hedges Treatment Center, Strong Memorial Hospital was dismissed as a defendant in this action. Plaintiff moved for a preliminary injunction ordering the SED to place Lara at Hedges. I denied plaintiff's motion for injunctive relief, 621 F.Supp. 975 (Item 31). I found that plaintiff failed to exhaust administrative remedies before turning to state or federal court, as is required by the EHA. 20 U.S.C. § 1415(e)(2).

Plaintiffs then requested that the Board of Education appoint an impartial hearing officer, pursuant to NY Educ.Law § 4404(1).[5] On December 26, 1985, the hearing officer issued a decision in favor of plaintiff, in which she found that Lara was emotionally disturbed and in need of educational

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[5] NY Educ.Law § 4404(1) provides:

> If the recommendation of the committee on the handicapped is not acceptable to the parents or guardians of a child, or if the committee fails to make a recommendation within such a period as may be required by regulations of the commissioner, such parents shall notify the board of education of this situation and the board shall appoint an impartial hearing officer to hear the appeal and make a recommendation to the board of education within such period of time as the commissioner by regulation shall determine. Individuals so appointed by a board of education shall be selected from a list of those who have successfully completed a hearing officer training program conducted by the department according to the regulations the commissioner. A record of proceedings before the hearing officer shall be maintained and made available to the parties. An appeal to the commissioner of education will lie from any determination of the board of education.

residential placement. Although noting that a hearing officer usually lacks the authority to place a child at a facility which is not approved by the Commissioner of the New York State Education Department [the Commissioner], the hearing officer ordered Lara's placement at Hedges, since no appropriate placement could be made from the approved list (*see* Appendix to Order of July 11, 1986, 638 F.Supp. 1564 (Item 63)).

In light of this favorable decision, plaintiff renewed the application in this court for a preliminary injunction ordering defendant to effectuate Lara's placement at Hedges. The SED still declined to place Lara at Hedges, and contended that plaintiff had yet to exhaust his administrative remedies through an appeal to the Commissioner. NY Educ.Law § 4404(1). I found that plaintiff had satisfied the exhaustion requirements under the EHA (Order of February 3, 1986 (Item 45)).

The EHA provides that parents must have an opportunity for a due process hearing, to be conducted through either the local educational agency or by the state educational agency. 20 U.S.C. § 1415(b)(2).[6] New York chose to have the hearing at the local level. NY Educ.Law § 4404(1); *see also* 638 F.Supp. at 1568. This decision is final unless appealed by a party aggrieved by the decision. 20 U.S.C. § 1415(c),[7] 34 CFR § 300.509. *See*

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[6] 20 U.S.C. § 1415(b)(2) provides:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

[7] 20 U.S.C. § 1415(c) provides:

> If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the find-

also 20 U.S.C. § 1415(e).[8] Here, neither plaintiff nor the local school district was aggrieved, and I found that plaintiff was not obliged, pursuant to federal law, to appeal the hearing officer's decision to the Commissioner. (Order of February 3, 1986, Item 45).)

On February 11, 1986, defendant New York State Commissioner of Education issued an order to show cause why the decision of the hearing officer should not be annulled pursuant to NY Educ. Law § 310. For the reasons set forth in the order of February 27, 1986 (Item 52), I deferred decision on plaintiff's motion for preliminary relief, pending the decision of the Commissioner. The Commissioner was permitted to review the hearing officer's decision in light of the partial approval status of the Hedges Treatment Center. It was hoped that the Commissioner would determine the propriety of Hedges for Lara Antkowiak, or suggest an alternative placement.

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ings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

[8] 20 U.S.C. § 1415(e) provides:

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2)Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The Commissioner's decision was issued on March 14, 1986. He found that Lara had no "educationally handicapping condition" (*see* Appendix to Order of July 11, 1986, 638 F.Supp. 1564 (Item 63)). Following the issuance of the Commissioner's decision, plaintiff moved for partial or full summary judgment. I found that the decision of the hearing officer was final as to whether plaintiff was handicapped and in need of special education (638 F.Supp. 1564, (Item 63)). I also found that, to the extent it provided for special education and related services, the IEP designed by the COH and approved by the hearing officer was final.[9] Plaintiff was granted partial summary judg-

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[9] Although the decision and order of July 11, 1986, granted partial summary judgment to plaintiff based upon the finality of the hearing officer's decision, I noted that Lara Antkowiak meets the federal definition of "seriously emotionally disturbed." 638 F.Supp. 1564, 1570 n. 10 (Item 63). The testimony at trial further supports the conclusion that Lara's condition adversely affects her educational performance so that she needs special education and related services.

> This case is somewhat unique in that Lara has a very high I.Q. and has been capable of superior academic performance. Furthermore, Lara's profound emotional and physical problems alone clearly necessitate institutionalization. Nonetheless, without institutionalization and special education, Lara derived no benefit from any educational program.

A passage from a recent Seventh Circuit decision is particularly apt:

> [t]he child cannot be cared for at home because of some purely physical problem, neither can he be educated unless he is institutionalized. *See Irving Independent School District* v. *Tatro*, [468] U.S. [883], 104 S.Ct. 3371, 3378 n. 11, 82 L.Ed.2d 664 (1984). Maybe he requires continuous medical attention which he could not get in a regular day school. So he must be institutionalized for educational reasons but equally for medical reasons. If one analogized the failure to reimburse the living expenses of such a child to a common law tort, the conclusion would be that the state was not liable for them; if the child will have to live in an institution anyway, regardless of educational needs, those living expenses are not caused by his educational needs, for they will be incurred whether or not any effort is made to educate the child. CF. *New York Central R.R.* v. *Grimstad*, 264 Fed. 334 (2d Cir. 1920); *Weeks* v. *McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898); Prosser and Keeton on the Law of Torts § 41, at pp. 256-66 (5th ed. 1984). But the Education for All Handicapped Children Act is not a tort statute, and to read it as one would lead to the odd

ment on these issues. Since the Commissioner improperly annulled the decision of the hearing officer on these grounds and suggested no appropriate placement for Lara, his decision was not considered by the court. In taking this action, defendant breached the procedural safeguards set forth in the EHA. *See* 20 U.S.C. § 1415(a).

In the order of July 11, 1986, (638 F.Supp. 1564) granting partial summary judgment to plaintiff, certain issues were delineated for trial: a) the availability of alternative placements; b) the suitability of Hedges to meet Lara's needs; c) the approval status of the various components of the Devereaux Foundation; and d) whether the services Lara receives at the Hedges Treatment Center are educational, medical, or related services.

A. Availability Of Alternative Placements

Most significantly, no other program has been identified as appropriate for Lara Antkowiak, either at an educational residential facility or at a residential treatment center. Throughout this action the court has pressed for defendant's recommendation as to an appropriate alternative placement for Lara. None was made.[10]

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result that the more the child's handicap interfered with his living, and not just with his education, the more his parents would have to pay.

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[T]he courts that have considered the question have rejected the argument that a state can avoid its obligations under the Act by showing that the child would have had to be institutionalized quite apart from educational needs that also required institutionalization.

Parks v. *Pavkovic*, 753 F.2d 1397, 1405-06 (7th Cir. 1985 (citations omitted).

[10] In April of 1985, while Lara was still at Strong Memorial, Hannah Flegenheimer suggested that Lara be placed at the Buffalo

During summations, counsel for defendant was asked whether defendant urged that there was an available alternative placement for Lara, or whether that argument was out of the case. He responded: "As far as any specific placement, yes. I'm not making any argument, I'm not identifying any other placement to which the court should direct placement."[11]

B. Suitability of Hedges Treatment Center for Lara

Counsel for defendant also acknowledged that defendant does not claim that Hedges is "necessarily an inappropriate or bad place for Lara." After considering the evidence adduced at trial, it is clear that the Hedges Treatment Center is a suitable placement for Lara and meets most, if not all, of her needs, as set forth in the IEP (Plaintiff's Exhibit 2).

The Hedges Treatment Center is located on the Mapleton Campus of the Devereaux Foundation. At trial, Kenneth Tenley, the Unit Administrator for the Mapleton Campus, described the three components of the campus. The Hedges Treatment Center is a residential unit for severely emotionally disturbed children. There are currently about 60 residents at the Hedges Treatment Center, which has separate dormitories for boys and girls. Lara resides with five other girls in a cottage, the least restrictive dormitory.

Psychiatric Center until another placement could be found, possibly at another residential treatment or psychiatric facility (Defendant's Exh. 4, Plaintiff's Exh. 8). During summation, counsel for defendant was asked whether defendant urges that placement at the Buffalo Psychiatric Center is or would have been appropriate for Lara. He replied that that is not the defendant's position. Counsel noted that, at that time, the SED was trying to be helpful while relying on its position that Hedges was not approved.

[11] During summations, defendant maintained its position that the State Education Department is under no duty to provide placement for Lara because she is not handicapped so as to need special education under the EHA. *See* Decision of Commissioner Ambach dated March 14, 1986 (Item 63, Appendix 2).

Most students who are at the Hedges Treatment Center attend the Hedges School, which is part of the treatment center. About 5 percent attend one of three alternative schools. Lara Antkowiak receives the academic portion of her program at the Devereaux Day School. The Day School is located on the Mapleton Campus, about 150 yards from the Hedges Treatment Center. Approximately 85 students attend the Devereaux Day School; most of these students are emotionally disturbed children who live at home and are bused to school each day from the surrounding communities. The school has certified special education teachers and support services, such as behavior management. About five students who reside at the Hedges Treatment Center attend the Day School.

According to Mr. Tenley, the decision to place Lara at the Devereaux Day School, rather than the Hedges School, was based on her age. He testified that Lara was too young, both in age and grade level, for the Hedges School and that she has a more appropriate peer group at the Day School. Both the Hedges Treatment Center and Devereaux Day School are approved by the Pennsylvania Department of Education as educational facilities.

During the trial, Mr. Tenley also testified as to how Hedges meets the goals described on Lara's Phase 1 IEP (Item 68, Vol. 3, pp. 40-46). She receives psychological counseling services and recreational services, as required by the IEP. The IEP also requires instruction in a non-competitive, small-group setting. These needs are met at the Devereaux Day School. Lara's classes average about eight in size. According to Mr. Tenley, because Lara is so bright, much of her work is individualized; she does not face competition with other students. She is also achieving some of the goals set out in the IEP. Lara's teachers believe that her obsessiveness with perfection in her school work has decreased. Mr. Tenley testified that Lara has completed her sixth and seventh grade requirements, and her relationship to her peers is increasingly improving.

C. Approval Status of Devereaux Foundation

Although the Hedges Treatment Center is an appropriate placement for Lara, it is not fully approved as an educational residential placement by the SED. Pursuant to the EHA, a State must determine whether private schools and facilities meet standards that "apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies . . . ." 20 U.S.C. § 1413(a)(4)(B)(ii). Under New York Education Law, students may be placed at private, out-of-state schools only if those facilities are approved by the Commissioner of the New York State Department of Education. NY Educ. Law §§ 4401(2) and 4402(2)(b)(2).

Ms. Flegenheimer testified that her office is responsible for monitoring all out-of-state private schools for compliance with all applicable rules and regulations. It also approves the placement of individual students at the schools if recommended by their school districts. (Item 68, Vol. 3, p. 85). Ms. Flegenheimer explained that when a private or out-of-state school seeks approval by the SED as a new program for New York State students, it must file an extensive application. If a school is approved, it is placed on the "approved list," which is circulated to the school districts in New York State every year or year and one-half. When a school appears on the approved list, according to Ms. Flegenheimer, it indicates to the local school district that the program is eligible for contracting for the education of New York State handicapped students. Schools are reviewed approximately every three years.

In the SED's October 1983 approved list (Plaintiff's Exhibit 3), the Devereaux Foundation of Pennsylvania was listed as an approved residential school serving children aged 6-21 who suffer from emotional disturbances, autism, and mental retardation. It was noted that 141 New York State students were enrolled at Devereaux, with 137 paid for by public funds and 4 privately placed. As Ms. Flegenheimer testified, the Foundation was listed as a single entity; there was no differentiation between campuses.

A new approved list was published in May of 1985 (Plaintiff's Exhibit 4). The Hedges Treatment Center of the Mapleton Campus received a separate listing for the first time. It was described as a coeducational facility serving severely emotionally disturbed children, ages 13-21. Alongside the listing in capital letters appeared the phrase, "Closed to new admissions." The May list was not received by the Buffalo COH until June of 1985 (Item 68, Vol, 1, p. 86). Ms. Wiggle was told for the first time in mid-April 1985 (when the SED turned down Lara's application for placement at Devereaux) that Hedges' approval status was limited.

Ms. Flegenheimer testified that the Hedges Treatment Center was closed to new admissions, in part, because the school at Hedges was not licensed by the State of Pennsylvania. Ms. Flegenheimer noted that New York State regulations require that a school be licensed in its home state in order to be approved as a school by the SED. There were also questions about the use of seclusion rooms at Hedges. She testified that the SED also was concerned about a Pennsylvania law which the Devereaux Foundation interpreted as requiring that children 14 and over be permitted to sign themselves out of treatment. Ms. Flegenheimer stated that the SED was concerned for the safety of New York students age 14 and over who might be permitted to leave the facility alone.

At the time the Hedges Treatment Center was closed to new admissions, there were already seven or eight New York students placed there. Ms. Flegenheimer testified that these students were permitted to remain at Hedges to avoid the disruption of their education. Only new admissions were precluded. It was hoped that the problems identified with Hedges might be resolved fairly quickly.

SED representatives first visited the facility in July of 1985, and returned for another visit in November of 1985.[12] As a

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[12] One of plaintiff's representatives requested in early April that the SED site visit of Hedges, set for summer, be moved up to late

result of that visit, the Hedges Center was reopened, effective January 3, 1986, for new admissions of students aged 14-21. All instances of non-compliance with New York law and regulations have been resolved.

Ms. Flegenheimer also testified that the Devereaux Day School is not approved by the SED.[13] According to Mr. Tenley, the Devereaux Foundation never sought New York State approval for the Day School, because it served primarily Pennsylvania day students and few out-of-state students attended the Day School. The Day School is licensed by the State of Pennsylvania.

Under certain circumstances, it may be appropriate for a court to order a child's placement in an unapproved or partially approved facility. *See Bevilacqua* v. *Board of Education of Niagara Falls*, CIV-79-550E, decided January 20, 1983 (W.D.N.Y.). In this case, as has been noted, the Devereaux Foundation had blanket approval when the COH first recommended that Lara be placed there. Ms. Flegenheimer agreed that none of the reasons given for the temporary hold on new admissions involved anything which would have affected Lara Antkowiak. Furthermore, the concerns about non-compliance were not serious enough to lead the SED to withdraw the seven or eight New York State students who had been residing at Hedges at the time of the hold on new admissions. All these concerns have now been resolved.

April so that any approval issues might be resolved and Lara placed there. The SED declined to change the dates for the visit (Defendant's Exh. 4).

[13] It should be briefly noted that in a 1983 program review of Devereaux, at page 4, it was noted that students who reside at Hedges might also be attending a day school within the Foundation, and not the Hedges School (Plaintiff's Exh. 6). This does not, as plaintiff would argue, amount to an implicit approval for the Devereaux Day School. It does indicate that defendant has been aware, since at least 1983, that Hedges students occasionally attend the Devereaux Day School.

Although the Hedges Treatment Center was cleared for new admissions effective January 3, 1986, for children aged 14 and over, there has been no serious argument that Lara's age should preclude her from attending Hedges. In any event, Lara was 14 on February 11, 1987. Also, although she was only 12 when she was admitted to Hedges, the SED's acceptable age for admission at that time was 13 (Plaintiff's Exh. 3). Mr. Tenely testified that although Lara was a little young when she was admitted, the Center made accommodations to meet her needs.

Defendant does point out that the Devereaux Day School has never been approved by the SED. However, it is important to note that the SED never found the Day School to be an unacceptable school; the school has simply never been reviewed for approval. Furthermore, Ms. Flegenheimer testified that SED regulations require out-of-state schools to be licensed by their home states, and the Devereaux Day School is licensed by the Pennsylvania Department of Education. Based on Mr. Tenley's testimony, the Devereaux Day School is more suited to Lara's needs than the Hedges School, which is approved. Both appear to offer similar services, except that the Hedges School serves mainly high school students, and Lara will not be at the high school grade level until next year. In addition, Mr. Tenley testified that there have been students from New York State who resided at the Hedges Treatment Center but received their educational program at the Day School, with full funding by the State of New York.

There is no indication that Lara is not receiving all the benefits and rights at Hedges that she would receive at a New York State school. 20 U.S.C. § 1413(a)(4)(B)(ii). On the facts of this case, the partial approval status of the Hedges Treatment Center does not preclude this court from ordering Lara's placement.

D. Nature of Services Lara Receives

Both educational and related services are considered part of the "free appropriate public education," guaranteed to children

under the EHA. 20 U.S.C. § 1401(a)(18).[14] A handicapped child is entitled to special education[15] and related services.[16] Related services include support services, such as speech pathology, audiology, psychological services, counseling, and physical therapy. Certain medical services are excluded from coverage. 20 U.S.C. § 1401(a)(17)(*see* footnote 16). *Irving* v. *Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984). Diagnostic and evaluative services are covered, but other medical services, when provided by a physician (or psychiatrist) are not. *Id.* at 894, 104 S.Ct. at 3379.

Although the nature of the services received by Lara was one of the issues left open for trial, defendant made no argument on this point in its post-trial brief or during summations. At trial,

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[14] 20 U.S.C. 1401(a)(18) provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

[15] 20 U.S.C. § 1401(a)(16) provides:

> The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

[16] 20 U.S.C. § 1401(a)(17) provides:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Mr. Tenley testified that Lara attends two individual and two group counseling sessions per week. Counseling and psychological services are considered to be related services when provided by a psychologist, social worker, or other professional. 34 CFR § 300.13(b)(8). Even psychotherapy has been found to be a related service when provided, on a daily basis, by a social worker under the supervision of a psychiatrist. *TG and PG* v. *Board of Education of Piscataway*, 576 F.Supp. 420, 423-24 (D.N. J.1983), *aff'd without opinion*, 738 F.2d 425 (3d Cir.), *cert. denied*, 469 U.S. 1086, 105 S.Ct. 592, 83 L.Ed.2d 701 (1984).

Mr. Tenley testified that no direct counseling is provided to Lara by the psychiatrist at Hedges. Lara works with a clinical psychologist. The psychiatrist at Hedges does a periodic evaluation of Lara's emotional condition and, when Lara first arrived, routinely evaluated her medication schedule. The limited diagnostic and evaluative services performed by the psychiatrist at Hedges for Lara are permitted medical services under the EHA. 20 U.S.C. § 1401(a)(17). Defendant has never argued that these services are not permissible under the EHA. Lara's parents pay independently for all medical services provided by her physician.

The related services a child receives must be needed in order to permit the child to derive some benefit from her educational program. *Irving* v. *Tatro*, *supra*. Before Lara entered Hedges and received this attention, she was not functioning educationally. She was withdrawn in class, would not complete packets from her school, and, because of her severe emotional disturbance, was unable or unwilling to work with her special education tutor. In light of the testimony of Dr. Alabiso, Mr. Tenley, Dr. Conti, and Ms. Quivey, I conclude that the related services received by Lara, especially counseling, were and are necessary to enable her to derive any benefit from the special instruction she receives at Hedges and the Devereaux Day School.

Defendant is required by the EHA to provide free, appropriate education to Lara Antkowiak. Defendant does not dispute,

and I so find, that the Hedges Treatment Center and the Devereaux Day School is a suitable placement for Lara and satisfies the requirements of her IEP. The services she receives there are educational and related services. Defendant does not point to any appropriate alternative placement, either at an educational residential program or at a residential treatment facility. Yet, despite this and the decision of the COH and the hearing officer that Lara is a handicapped child in need of special education and related services at a residential program, defendant has refused to provide Lara with the free, appropriate education to which she is entitled under the EHA.

Counsel for the defendant suggested that relief, if granted, be conditioned upon the parents returning to the COH for a new IEP. New York law requires that the COH evaluate the status of a handicapped child at least annually. NY Educ. Law § 4402(1)(b)(2). The Buffalo Committee on the Handicapped did not review Lara after the Phase 1 IEP was prepared in February of 1985. As Ms. Wiggle testified, the Phase 1 IEP includes a classification for the child, a brief description of the program the child will need and any related services, and the goals for the child. A Phase 2 IEP is prepared after the child is already in the program, and expands upon the Phase 1 IEP, including more detail (Item 68, Vol. 1, pp. 75-77). The COH reviews the IEP annually and, if necessary, prepares a new IEP (Item 68, Vol. 1, p. 80).

When a child is privately placed, however, the IEP is not reviewed unless the parents request it (Item 68, Vol. 1, p. 89). Here, the Antkowiaks did not request it. Only a Phase 1 IEP was prepared. In addition, Ms. Wiggle testified that since the parties were in litigation, no review was undertaken. Counsel for defendant stated that he does not fault the parents for failing to seek any review of the IEP while the case has been in litigation. However, he points out that both Dr. Antkowiak and Dr. Alabiso testified to an improvement in Lara's condition, and that perhaps a new IEP is necessary, since Lara may not need the level of care found to have been necessary two years ago.

Both John Antkowiak and Dr. Alabiso testified that Lara has improved significantly since being placed at Hedges and could potentially be released after June of 1987. Dr. Alabiso testified that Lara's anorexia is in remission. She has begun to open up emotionally and is making a few friends among her peers. She is functioning educationally. Dr. Alabiso cautioned, however, that Lara is in a period of transition and needs more time in an educational residential facility before she can function successfully in a less-controlled environment, without risk of relapse (Item 68, Vol. 2, pp. 25-30). Mr. Tenley also testified that Lara still requires the services she receives at Hedges. Although she has improved, Lara is now in a transitional phase, and the risk of a relapse is significant.

I decline to condition relief upon the drafting of a new IEP. Since a Phase 2 IEP, which is ordinarily prepared shortly after the child enters the program, was never prepared for Lara Antkowiak, the Buffalo COH may prepare one to reflect Lara's current program at Hedges. The parents and the COH will perform an annual review of Lara's IEP consistent with applicable regulations. The court understands that an annual review is usually done at the end of each academic year.

Defendant shall immediately effectuate the placement of Lara Antkowiak at the Hedges Treatment Center of the Devereaux Foundation at no expense to her parents.

Reimbursement

Plaintiff seeks reimbursement for Lara's tuition from the date she was placed at Hedges throughout the date of this decision. Defendant claims that under the eleventh amendment of the United States Constitution, this court lacks jurisdiction to make a retroactive award of money damages.

The Hedges' tuition costs, which includes both the educational and residential programs, was $4,200 per month for private placements, effective September 1, 1986. Before that date, tuition was $3,575 per month (Item 68, Vol. 1, p. 62). Plaintiff does not seek reimbursement for the summers of 1985

or 1986. Lara's tuition for the months of July and August of 1985 was paid pursuant to an order of a Family Court Judge in New York State (Plaintiff's Exhibit 1). Mr. Tenley testified that her tuition for the summer of 1986 was also provided for. He also noted that, had Lara been placed by the SED, her tuition costs would have been approximately $2,800 per month based upon agreements between the Devereaux Foundation and the State of New York. Item 68, Vol. 3, p. 49.

Education authorities may be ordered to fully reimburse parents for their expenses in privately placing a child, should it ultimately be determined that the placement selected by the parents was proper under the EHA. *Burlington School Committee* v. *Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985). In *Burlington*, reimbursement was sought from the local school, not an officer or agency of the state, and so the eleventh amendment did not apply. Defendant in the instant case, however, is the Commissioner of the State Education Department, which raises questions as to the court's authority to order reimbursement.

The eleventh amendment has been broadly read to deprive federal courts of jurisdiction to hear claims brought by a private party against a state, unless the state consents to suit. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1983). While the state cannot be sued in its own name, it is well established that state officials may be sued in federal court for violations of federal law. If found to have been acting in contravention of federal law, the state official may be ordered to conform his future conduct to that law. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

However, when the relief sought is retroactive money damages, the suit may be barred by the eleventh amendment even though the state is not formally named as a party. In those cases, the state has been viewed as a real party in interest, since the money damages will be ultimately paid by the state.

Edelman v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The parties agree that, since the reimbursement sought here would come from the state treasury, the *Edelman* line of cases makes the State of New York a real party in interest.

There are, however, instances in which the eleventh amendment will not bar suit against the state. A state may consent to suit in federal court. *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 3146-47, 87 L.Ed.2d 171, *reh. denied*, ____ U.S. ____, 106 S.Ct. 18, 87 L.Ed.2d 696 (1985). In this case, there is no claim that the State of New York formally consented to suit in federal court. There can be no implied consent, since the Supreme Court has held that a state does not waive its immunity to suit by participating in a federal program, such as the EHA, through which it receives federal funding. *Florida Dept. of Health* v. *Florida Nursing Home Association*, 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (*per curiam*).

Even if a state does not consent to suit in federal court, Congress may, when acting pursuant to section 5 of the fourteenth amendment, override the eleventh amendment. In enacting the EHA, Congress was acting pursuant to its powers under section 5 of the fourteenth amendment "to enforce, by appropriate legislation, the substantive powers of the fourteenth amendment." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). As was clearly stated by Congress in the preamble to the EHA, the Act was passed to "assure equal protection of law," 20 U.S.C. § 1400(b)(9); *Smith* v. *Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 3486, 82 L.Ed.2d 746 (1984), as guaranteed by the fourteenth amendment.

The issue is whether Congress chose, in the exercise of its fourteenth amendment powers, to abrogate the states' eleventh amendment immunity when it enacted the EHA. The Supreme Court has recently held that Congress may abrogate the eleventh amendment "only by making its intention

unmistakably clear in the language of the statute." *Atascadero*, 105 S.Ct. at 3147.

In *Atascadero*, the statute at issue was the Rehabilitation Act, 29 U.S.C. § 794. The question was whether, pursuant to the Rehabilitation Act, a state could be ordered to pay retroactive money damages. The Rehabilitation Act provides that no program or activity which receives federal financial assistance shall discriminate against a handicapped individual on the basis of his handicap. The statute also provides remedies for those aggrieved by any act or failure to act by "any recipient of Federal assistance." 29 U.S.C. § 794a. Among the remedies provided is a right to bring an action in federal court. Section 794a, referring to 42 U.S.C. § 2000e-16 and 5(f)-(k).

The *Atascadero* Court noted that states are among the class of recipients of federal aid under the Rehabilitation Act. However, the Court went on to state: "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," *Id.* at 3149. The Rehabilitation Act was held not to abrogate the eleventh amendment.

The Rehabilitation Act makes no explicit mention of states in the text of the statute. On the contrary, the EHA is addressed to the states. In *David D.* v. *Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1790, 90 L.Ed.2d 336 (1986), decided after *Atascadero*, the court distinguished the EHA from the Rehabilitation Act. Unlike *Atascadero*, *David D.*, *supra*, was not a reimbursement case; the eleventh amendment issue arose in the context of the applicability of state educational standards. However, the discussion is equally applicable to the instant action. The court stated:

> In addition to the explicit comments within the statute itself and the Supreme Court's ruling that Congress considered itself to be acting under its fourteenth amendment powers to promote the equal protection of law, there is other evidence of congressional intent to subject states to

> federal court jurisdiction. Unlike the remedies for violation of § 504 of the [Rehabilitation Act], which are broadly directed to "*any* recipient of Federal assistance," and include a board range of institutions and organizations, the EHA is directed to one class of actors: states and their political subdivisions responsible for providing public education. *See, e.g.*, 20 U.S.C. §§ 1412, 1413; 34 C.F.R. § 300.2. This accords with the most basic of political knowledge that free public education is provided by and under the aegis of the states.
>
> Under the federal Act and its implementing regulations, the State educational agency promises to ensure that it and its local educational agencies will provide at minimum a free appropriate public education. Part of these guaranteed rights is the due process complaint and hearing system which is to take cognizance of "*any matter* relating to" a disabled child's education or procedural rights. The culmination of the state administrative appeals process is the right of any party "aggrieved" by the decision or procedure employed to take the matter to either state or federal court. 1415(e)(2). Obviously, since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding.

Id. at 422. The court concluded that, in enacting the EHA, Congress "effectively abrogated the sovereign immunity of the states from suit in federal court." *Id.* at 422.

After careful consideration, I adopt the reasoning of the *David D.* court and conclude that, in enacting the EHA, Congress made its intention to abrogate the eleventh amendment unmistakably clear in the language of the statute. *Atascadero, supra* 105 S.Ct. at 3147. *See, in particular,* 20 U.S.C. §§ 1412(6) and (7), 1415.

Pursuant to *Burlington, supra*, plaintiff is entitled to reimbursement for the tuition he paid from the time Lara was placed at Hedges by plaintiff on May 15, 1985 (exclusive of July and August of 1985 and 1986, for which payment has been made.) Defendant has had numerous opportunities to secure

appropriate alternative placement of Lara, and has failed to do so.

To summarize, defendant shall immediately effectuate Lara Antkowiak's placement at the Hedges Treatment Center of the Devereaux Foundation at no expense to plaintiff. Defendant shall reimburse plaintiff for Lara Antkowiak's tuition from May 15, 1985, to the present, in accordance with this opinion. Plaintiff shall prepare a proposed judgment on five days' notice to the court and defense counsel.

So ordered.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. No. 85-532C

LARA ANTOKOWIAK, by her Parent and Natural Guardian, John M. Antkowiak,

Plaintiff,

v.

GORDON M. AMBACH, as Commissioner of the New York State Education Department,

Defendant.

JUDGMENT

This action, having been commenced upon the filing of a Complaint on April 23, 1985,

And the Court, having rendered a partial Summary Judgment on July 11, 1986, finding that plaintiff Lara Antkowiak ("Lara") is educationally handicapped uner the Education of the Handicapped Act ("EHA") and that the Individualized Educational Plan ("IEP") developed by the Buffalo Committee on the Handicapped ("COH") for Lara is considered final, to the extent that it provides for educational and related services as defined by the EHA,

And this matter having come on for trial, before the Court on October 20, 21 and 29, 1986, and the Court having heard testimony, received evidence, heard oral arguments and received written arguments presented by both plaintiff and defendant,

And, following trial, the Court having rendered a decision on February 19, 1987 finding: a) that no alternative placement, other than the Hedges Treatment Center of the Devereux Foundation ("Hedges"), has been identified as an appropriate educational placement for Lara; b) that Hedges is and has been

since May 15, 1985 an appropriate educational placement for Lara and satisfies the requirements of her IEP; c) that the partial approval status of Hedges does not preclude the Court from ordering Lara's placement at Hedges; and d) that the services Lara receives and has received at Hedges are educational and related services under the EHA;

NOW, upon the aforementioned proceedings and upon all the papers and proceedings had herein, it is

ORDERED, ADJUDGED and DECREED that defendant shall immediately effectuate Lara's placement at Hedges at no expense to plaintiff, and it is

ORDERED, ADJUDGED and DECREED that defendant shall reimburse plaintiff for Lara's tuition at Hedges from May 15, 1985 to the date defendant effectuates Lara's placement at Hedges, and it is

ORDERED, ADJUDGED and DECREED that the total tuition reimbursement owed by defendant to plaintiff, as of the date of the signing of this judgment, is $69,700.00, which represents $3,500.00 per month for the period May 16 through June 30, 1985, $3,375.00 per month for the period September 1, 1985 through June 30, 1986 and $4,100.00 per month for the period September 1, 1986 through March 31, 1987, and it is further

ORDERED, ADJUDGED and DECREED that plaintiff is awarded costs in this action and interest from the date of entry of judgment.

Date: March 18, 1987
Buffalo, New York

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Supreme Court of the United States

No. A-909

LARA ANTKOWIAK, by her parent and Natural Guardian, JOHN M. ANTKOWIAK,

Applicant,

v.

THOMAS SOBOL, Commissioner, New York State Education Department

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 19, 1988.

/s/ Thurgood Marshall
THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 2nd day of June, 1988.

STATUTORY AND REGULATORY PROVISIONS

United States

Title 20

Sec.1400. Congressional statements and declarations

(b) The Congress finds that—

* * *

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers,

* * *

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

* * *

(c) It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in Section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to asses and assure the effectiveness of efforts to education handicapped children.

Sec.1401 Definitions

(a) As used in this chapter—

* * *

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C)

include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Sec.1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

* * *

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings,

adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs and procedures required pursuant to the provisions of this section and section 1413 of this title.

Sec.1413. State Plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

* * *

(4) set forth policies and procedures to assure—

* * *

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

Sec.1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit

which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, available, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, eval-

uation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

* * *

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educa-

tional agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Code of Federal Regulations

Title 34

§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

300.508 Hearing rights

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

§ 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 300.340-300.349 of Subpart C.

NEW YORK EDUCATION LAW

§ 4401. Definitions

As referred to in this article.

* * *

2. "Special services or programs". For purposes of this article, special services or programs shall mean the following:

a. Special classes, transitional support services, resource rooms, home instruction, and special teachers to include itinerant teachers as provided by the schools of the district of residence with such terms and services defined by regulations of the commissioner.

b. Contracts with other districts for special services or programs.

c. Contracts with or special services or programs provided by boards of cooperative educational services.

d. Appointment by the commissioner to a state or state-supported school in accordance with article eighty-five, eighty-seven or eighty-eight of this chapter.

e. Contracts with private non-residential schools which have been approved by the commissioner and which are within the state for special services or programs.

f. Contracts with private non-residential schools which have been approved by the commissioner and which are outside of the state for special services or programs.

g. Contracts with private residential schools which have been approved by the commissioner and which are within the state for special services or programs.

h. Contracts with private residential schools which have been approved by the commissioner and which are outside the state for special services or programs.

i. Contracts with the state university at Binghamton for nonresidential special services or programs at the children's unit for treatment and evaluation which have been approved by the commissioner.

j. Provision of educational services in a residential facility for the care and treatment of children with handicapping conditions under the jurisdiction of a state agency other than the state department of education.

k. Related services which shall in appropriate cases be furnished to children with handicapping conditions shall include audiology, counseling, occupational therapy, physical therapy, speech pathology, medical services as defined by regulations of the commissioner, psychological services, and other appropriate support services.

l. Contracts for residential or nonresidential placements with a special act school district listed in chapter five hundred sixty-six of the laws of nineteen hundred sixty-seven.

m. Provision of nonresidential education services in Fairmount children's center, which facility has been approved by the commissioner for the education of children with handicapping conditions. Children placed under the provisions of this paragraph shall not be eligible for state aid under the provisions of sections thirty-six hundred two and thirty-six hundred two-c of this chapter.

§ 4402

* * *

2. a. The board of education or trustees of each school district shall be required to furnish suitable educational opportunities for handicapped children by one of the special services or programs listed in subdivision two of section forty-four hundred one. The need of the individual child shall determine which of such services shall be rendered.

* * *

b. (2) The board shall select the most reasonable and appropriate special service or program for such children from those programs specified in paragraphs a, b, c, e, g, i, k and l of subdivision two of section forty-four hundred one of this article upon receipt of the recommendation of the committee on the handicapped. All contracts with private schools pursuant to the provisions of paragraphs d, e, f, g, and l of subdivi-

sion two of section forty-four hundred one of this article shall be subject to the approval of the commissioner. All contracts under paragraph c of subdivision two of section forty-four hundred one shall be made in accordance with the provisions of subdivision four of section nineteen hundred fifty of this chapter. No child shall be placed in a residential school nor shall a board recommend placement in a residential facility specified in paragraph j of subdivision two of section forty-four hundred one unless there is no appropriate nonresidential school available consistent with the needs of the child. The board shall provide written notice of its determination to the parent or legal guardian of recommendations of such child. If the determination of the board of education is not consistent with the recommendations of the committee on the handicapped, such notice shall include the statement of the reasons for such determinations which shall identify the factors considered by the committee on the handicapped in its evaluation.